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in the
Supreme Court
of the
United States

OCTOBER TERM, 1972

NO. _____

MARTI POGUE,

Petitioner,

vs.

RETAIL CREDIT COMPANY,

Respondent.

From the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI
MARTI POGUE

MARTI POGUE, In Proper Person respectfully petitions the Supreme Court of the United States to grant a Writ of Certiorari in the case of Marti Pogue v. Retail Credit Co., U.S. Court of Appeals Case No. 71-1270, wherein Marti Pogue was the Appellant and Retail Credit Co. was the Appellee. The opinion of the U.S. Court of Appeals for the Fourth Circuit is cited as *Pogue v. Retail Credit Co.*, 435 F.2d 336 (1972). Petitioner says she believes the lower court erred when it summarily affirmed the decision of the U.S. District Court for the Eastern District of Virginia and directs the Court's attention to the testimony and evidence of the Trial Court, Case No. 247-69A, and the decision of that Court handed down by Oren R. Lewis, District Judge.

The jurisdiction of the United States Supreme Court is invoked by virtue of the fact that Petitioner earnestly believes that both the Trial Court and the Appeals Court, in rendering their respective decisions violated her right to a trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States of America. See *Baltimore & Carolina Line, Inc. v. Redman*, N.Y. (1935), 55 S.Ct. 890, 295 U.S. 654, 79 L.Ed. 1636; also *Allen v. Briggs*, D.C. Pa. (1945) 62 F.Supp. 229.

The judgment sought to be reviewed in the U.S. District Court, Case No. 247-69A, was handed down on November 5, 1972 and entered on November 13, 1972. The judgment sought to be reviewed in the U.S. Court of Appeals, Case No. 71-1270 was rendered on January 19, 1972.[1]

---

[1]Petitioner contends that there were two separate sets of errors; one on the part of the Trial Court, the other on the part of the Appeals Court.

On February 11, 1972 the U.S. Court of Appeals ordered, at Petitioner's request, which she filed in Proper Person, that the time for filing a Petition for Rehearing be extended to and including February 25, 1972. Accordingly, on February 22, 1972 she mailed to the Office of the Clerk of the U.S. Court of Appeals her Petition for Rehearing and on March 6, 1972 that Court denied her Petition for Rehearing.

Petitioner respectfully submits that on September 27, 1972 she received a telephone call from the Clerk of the United States Supreme Court granting an extension of time for filing a Petition for Certiorari and calls the Court's attention to a letter to her (App. 1) dated September 30, 1972 from the Office of the Clerk of the United States Supreme Court.

The United States Supreme Court's jurisdiction to review the judgments handed down by the U.S. District Court and the U.S. Court of Appeals is conferred by the statutory provision governing diversity of citizenship and amounts in controversy in excess of $10,000.00.

The questions presented for review are as follows:

I. DID NOT THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S ACTION AGAINST THE PLAINTIFF (HERE THE PETITIONER) IN FAVOR OF THE DEFENDANT RETAIL CREDIT CO. WHEN THE PLAINTIFF'S COMPLAINT WAS BASED UPON THE THEORY THAT A CREDIT REPORTING COMPANY IS LIABLE TO ONE WHO ACCEPTS AND RELIES ON A CREDIT REPORT EVEN THOUGH THERE WAS NO "PRIVITY OF CONTRACT" BETWEEN THE PLAINTIFF, USER OF THE REPORT, AND THE COMPANY SUPPLYING SAID REPORT IF IN FACT THE CREDIT REPORT WAS EITHER NEGLIGENTLY OR WITH "GROSS NEGLIGENCE" PREPARED FOR RELEASE?

II. DID NOT THE COURT OF APPEALS COMMIT A SECOND ERROR, SEPARATE AND INDEPENDENT OF THE FIRST, WHEN THAT COURT IN ITS OPINION CONCEDED THAT THE PLAINTIFF HAD PROBABLY PROVED HER CASE BUT HAD FAILED TO PROVE RELIANCE BECAUSE "DESPITE MISS POGUE'S TESTIMONY, AN OBJECTIVE EVALUATION OF THE REPORTS PUBLISHED BY RETAIL CREDIT INDICATES THAT THEY CONTAIN NO INFORMATION ON WHICH AN EXPERIENCED BUSINESSWOMAN MIGHT REASONABLY RELY"?

STATEMENT OF FACTS

The Appellant, Pogue, a resident of the State of Florida brought suit against Retail Credit Co., a corporation incorporated under the laws of the State of Georgia and doing business in the State of Virginia, for damages incurred as a result of her reliance upon a financial and character report compiled and published by Retail Credit Co., a mercantile organization in the business of providing such reports, obtained for her by Hammerly as well as her reliance upon misrepresentations made by Hammerly. Her complaint against Retail Credit Co. alleged breach of contract and constructive fraud. (R. Vol. 1-2) (All emphasis herein supplied by author unless otherwise noted.)

The basis of Petitioner's complaints revolves around a financial and character report prepared by Retail Credit Co. on Walker & Townsend, Inc., a New York corporation (hereinafter "Walker & Townsend"). Petitioner read an advertisement in a Miami newspaper to the effect that Walker & Townsend were engaged in the business of loaning up to ninety per cent of the value of stock placed with it for collateral. (Tr. 59). She traveled from Miami to New York City and entered into negotiations with Walker & Townsend. On or about July 20, 1967 she borrowed $33,000.00 from Walker & Townsend, signed two notes for $18,000.00 and $15,000.00 and signed a power of attorney and letter of instruction to Walston & Co., her Miami broker and Peoples Bank authorizing transfer to Walker & Townsend of the stock they held for her (Tr. 56-58).

Petitioner was not entirely satisfied with her knowledge of Walker & Townsend, however, and on the day

following her first transaction with them, she telephoned Mr. Hammerly in Leesburg, Virginia. Hammerly was in the insurance investment business. (Tr. 30). Petitioner testified that prior to her negotiations with Walker & Townsend, Hammerly told her that he could get a "Dun & Bradstreet report" for her on any company she desired. (Tr. 29). Recalling this and confident that she could cancel the loan with Walker & Townsend by repaying the loan and instructing the transfer agents not to transfer the stock she requested Hammerly to provide a financial and character report by Dun & Bradstreet on Walker & Townsend. (Tr. 30). Subsequently, she received a letter, dated August 1, 1967, from Hammerly which stated:

"Dear Marti:

I have ordered the other credit reports and I attach a photostat of a letter on Walker and Townsend. I have asked Retail Credit to make a *complete report.* As soon as I get them, you will hear from me." (Emphasis supplied.) (App. p. 12).

The letter from Retail Credit, which was attached was dated July 25, 1967, and addressed to Hammerly, stated that a search of Retail Credit's records revealed no information on Walker & Townsend. The letter closed by stating that an "up-to-date investigation" could be provided. (App. p. 13) (Tr. 33)

Petitioner testified that she called Hammerly upon receipt of the letter and photostat copy and asked him why he had not provided a Dun & Bradstreet report as requested. (Tr. 32). Hammerly replied that Retail Credit had a commercial department and its reports "were every

bit as good as Dun & Bradstreet reports." (Tr. 34). On the basis of this representation, she stated she would accept his word as he had superior knowledge and allowed him to pursue the requested information from Retail Credit. (Tr. 34). Thereinafter, she received a letter from Hammerly, dated August 14, 1967, with a Retail Credit report on Walker & Townsend. (Ap. Br. A. 15a-16a) (Tr. 35) The cover letter from Hammerly stated:

"Dear Marti:

Attached please find a Retail Credit report on Walker and Townsend. You are not supposed to have this with my account number on it; hence, you will note that I have cut it off.

In any event, it is not very informative, but it is the best I know how to do. *It does not look like they are fronting for any crooked outfit, so it looks like you are in good shape.* In any event, I hope so." (Emphasis supplied.) (App. p. 14).

The attached report stated:

". . . Upon our inspection Walker & Townsend, 80 Wall Street, New York City, we find this firm occupies several offices on the fourth floor of this building. They have been here for the past six years. This firm is a European finance company specializing in collateral loans. They are not a fund for any union. Principles (sic) of this firm cannot be identified as the firm does not reveal this information. The principles (sic) have their identity hidden. Two people will run the firm as

representatives in New York City, a Mr. Harrison and a Mr. Lundy. These people, we were told are constantly on the road traveling and very rarely in their office. This firm also has a bookkeeping department located somewhere in Philadelphia. We noted the door of the office had a cable address written Bienvenido, New York.

A source contacted at this business address stated in his opinion this is a multi-million dollar outfit. Please note this could not be confirmed." (Tr. 36-7) (App. p. 15).

Relying upon the report and upon Hammerly's assurances, she did nothing to cancel her arrangement with Walker & Townsend and later negotiated another loan with the company for $18,000.00. At the same time, the second note, signed on July 20, 1967, for $15,000 was re-executed and the old one destroyed. (Tr. 225-26). Again she pledged stock as collateral for the loan in the same manner described previously. As a result of the three loans, she transferred approximately $67,000 worth of securities to Walker & Townsend. (Tr. 52-3) (Ap. Br. A. 24-27a) Subsequent to the third loan she became suspicious of Walker & Townsend because of their failure to forward dividend checks to her. She then initiated further investigation of the company through her Miami bank. (Tr. 39-40). The bank ordered a Dun & Bradstreet report on the company. When that report was provided to her, some time in October of 1967, she became fearful of the safety of her securities. (Tr. 42-44) (Ap. Br. A. 18-22a). She called Hammerly and informed him that it appeared that Walker & Townsend were "worthless" as the report clearly showed "they were a bunch of crooks and they were under Federal

indictment . . . and had other previous arrests and convictions and that the report he had given me wasn't worth anything." (Tr. 45). Hammerly then refused to lend her money to aid her in trying to get her stocks back. (Tr. 48).

She then went to New York with an attorney to try to save her stock. She found the Walker & Townsend offices abandoned, their phone disconnected and their officers unavailable. (Tr. 50-51). She, some months later, was able to make arrangements through a New York bank to pay off her loan for the return of the stock but her efforts were too late—Walker & Townsend had absconded with the securities. (Tr. 106).

ARGUMENT

I. DID NOT THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S ACTION OF DIRECTING A VERDICT AGAINST THE PLAINTIFF AND IN FAVOR OF THE DEFENDANT, RETAIL CREDIT CO. WHEN THE PLAINTIFF'S COMPLAINT WAS BASED UPON THE THEORY THAT A CREDIT REPORTING COMPANY IS LIABLE TO ONE WHO ACCEPTS AND RELIES ON A CREDIT REPORT EVEN THOUGH THERE WAS NO "PRIVITY OF CONTRACT" BETWEEN THE PLAINTIFF, USER OF THE REPORT, AND THE COMPANY SUPPLYING SAID REPORT IF IN FACT THE CREDIT REPORT WAS EITHER NEGLIGENTLY OR WITH "GROSS NEGLIGENCE" PREPARED FOR RELEASE?

In replying to this question which the Appellant raised in her appeal before the U.S. Court of Appeals, that Court in its published Opinion said, "The test on directing a verdict, however, is not whether there is any evidence, but whether "there are no controverted issues of fact upon which reasonable men could differ." 5A Moore's Federal Practice (2d Ed. 1971) §50.02 (1); *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-80; *Pinehurst, Inc. v. Schlamowitz*, 4 Cir., 351 F.2d 509, 513."

"Perhaps appellant met this burden on the question of Retail Credit's negligence in preparing the report." Obviously, this statement is not a conclusive answer and with the Court's indulgence Plaintiff wishes to reiterate for this Court her argument on the theory of Retail Credit's liability as presented in her appeal brief.[2]

In testing the soundness of the Trial Court's decision to grant the defendant Retail Credit's motion for a directed verdict this Court must view the evidence in the light most favorable to the plaintiff, Pogue. *Richmond Television Corp. v. United States*, 354 F.2d 410 (4th Cir. 1965). Taking these favorable facts, without making a decision concerning credibility, the Court must then determine whether or not the evidence, viewed in this light, makes out a prima facie case for liability against the defendant under any theory of recovery. See *Pinehurst v. Schlamovitz*, 351 F.2d 509 (4th Cir. 1965).

[2]"Claims of error neither argued nor submitted may be assumed abandoned." *Erie R. Co. v. Collins*, 40 S.Ct. 450, 253 U.S. 77, 64 L.Ed. 790.

The evidence showed that Retail Credit was a mercantile credit reporting agency with offices in several cities that engaged in the business of investigating and reporting upon the reputation and credit standing of individuals and corporations. (Tr. 34, 172-78). Testimony also showed that Retail Credit accepted a fee for rendering a financial and character report concerning Walker & Townsend from Hammerly who was acting in her behalf. (Tr. 148, 151.) The Trial Court further found that it was well known in the credit reporting trade that such reports were often obtained by subscribers, such as Hammerly, for third parties. (Tr. 146, 188). Moreover, Hammerly admitted that he had previously engaged in this practice with Retail Credit reports. (Tr. 145).

Plaintiff's clear reason for obtaining the report was to decide whether to let her first transaction with Walker & Townsend stand or to attempt to cancel it. (Tr. 29-30). In addition she desired the information to aid her in deciding whether to enter into any subsequent transactions with Walker & Townsend. Upon obtaining the report she was not informed of any reason why she should not do business with Walker & Townsend. Accordingly, she elected to forego any attempt to rescind the July 20, 1967 assignment of securities and instead, renegotiated the second of the two loans and entered into a third loan agreement with Walker & Townsend. The report basically speaks for itself, with the qualification that the first letter from Retail Credit to Hammerly stated that "an up-to-date investigation" could be made of Walker & Townsend. (Ap. Br. A. 14a) (Tr. 32). It is apparent that she and Hammerly relied upon this representation before ordering the investigation. (Tr. 33-34).

Nevertheless, the Trial Court directed a verdict in favor of Retail Credit Co. at the conclusion of the evidence because [it stated] there was no "credible evidence on any theory . . .". (Tr. 209).

It is respectfully submitted that the Trial Court failed to consider *both* theories offered by the plaintiff against Retail Credit. The arguments below indicate that the Court was concerned with the absence of any "privity of contract" between the parties (Pogue and Retail Credit) and that this factor weighed in the Court's decision. (Tr. 205-09). In addition, by its own admission the Court made some findings of credibility in making its decision. (Tr. 209). It should be recalled that neither the pleadings nor the evidence relied exclusively upon a contractual theory against Retail Credit.

The Court did not appear to consider the theory of negligent misrepresentation applicable to plaintiff's case. However, it is submitted that recovery could be granted under this theory. This theory is one based upon duty and it permits recovery where the injured party did not deal directly with the person who made the misrepresentation. As Justice Cardozo stated:

> "One who follows a common calling may come under a duty to another whom he serves, *though a third may give the order or make the payment*". *Glanzer v. Shepard*, 233, N.Y. 236, 239, 135 N.E. 275, 276 (1922). (Emphasis supplied).

In *Glanzer*, *supra*, the plaintiff purchased a large quantity of beans from a third party. The seller contracted with the defendant, a public weigher, to weigh the beans

and make certificate of the weight to it and the buyer. The weigher was negligent and the buyer sued for the amount of his overpayment based upon the overweight. Recovery was allowed even though there was no contract or agreement between the plaintiff and the weigher.

In finding liability Justice Cardozo held that the significant factor upon which recovery was based for negligent misrepresentation was the likelihood that the defendant realized that a third party would rely upon his representations:

> "The controlling circumstance is not the character of the consequence, but its proximity or remoteness in the thought and purpose of the actor." Id. at 240, 135 N.E. at 276.

Justice Cardozo was careful to point out that:

> "Here the defendants are held, not merely for careless words . . . but for careless performance of a service—the act of weighing—which happens to have found in the words of a certificate its culmination and its summary." Id. at 241, 135 N.E. at 276.

In a case of personal injury, not pecuniary loss, the Virginia courts have taken notice of the fact present here, that the negligent misrepresentation was made by a person who was in the business of having unique knowledge concerning the field about which he spoke. See *Valz v. Goodykoontz*, 112 Va. 853, 72 S.E. 730 (1911).

In considering whether the lack of "privity of contract" will bar recovery for negligent misrepresentation for pecuniary loss in any case the courts have erected vague and artificial barriers to protect certain classes of defendants and to curtail recovery. See W. Prosser, *Misrepresentation and Third Persons*, 19 Vand. L. Rev. 230 (1966). Unlike the steady rejection of the requirements of privity in cases of personal injury[3] the evolution of the law in the area of pecuniary loss for misrepresentation based upon negligence has been uneven and slow.

The leading case often cited for limiting liability is Justice Cardozo's opinion in *Ultramares v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931). There the Court denied liability for negligent misrepresentation by a public accountant who was hired by a corporation to prepare a balance sheet with the knowledge that certain unspecified investors would possibly rely upon the balance sheet in determining whether to invest. The plaintiff lost several hundred thousand dollars by relying on a negligently prepared balance sheet. The Court held that the accountant, although not hired by the plaintiff, owed him and others of his class a certain legally definable duty. Id. at 444, 174 N.E. at 441. However, because of the indefinite size of the possible class of plaintiffs in such cases, Justice Cardozo held that unless the plaintiff's interest was "foreseen" by the defendant there was a duty only to refrain from "gross negligence" insofar as third parties were concerned. The logic and the wisdom of this decision has been assailed

[3]For the development of the law in Virginia see *Hempstead v. General Fire Extinguisher Corp.*, 269 F.Supp. 109 (D.Del. 1967) and *Pierce v. Ford Motor Co.*, 190 F.2d 910 (4th Cir.), cert. denied, 342 U.S. 887 (1951).

consistently.[4] and recently at least one federal court has effectively overruled *Ultramares, supra*, by broadening the definition of who is "foreseen" and making this a *jury* question. *Rusch Factors, Inc. v. Levin*, 284 F.Supp. 85 (D.R.I. 1968).

As *Rusch Factors, supra*, properly points out the *Ultramares* rule is an "unwarranted inroad upon the principle that, the risk reasonably to be perceived defines the duty to be obeyed . . ." Id. at 91. Moreover, the *Rusch Factors* Court points out that the Restatement of Torts[5] has taken a view that to be liable the negligent party need not know the identity of the third party who relies, but only the existence of such a class. The Court also referred with approval, to the dissenting opinion in the *New York Title & Mortgage Co. v. Hutton*, 71 F.2d 989 (D.C. Cir. 1934) which reasoned there would seem to be no logical distinction between physical injury and damage to purely economic interests:

> "Nor is there any sound reason for denying liability for the use of negligent words. . . . It has been said that the reckless writer should be held to as high a standard as the reckless driver, "for his pen may impoverish thousands while his car can hurt but a few." Id. at 996

It is respectfully submitted that there seems no question that Retail Credit should have known that its report might

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[4]See, e.g., Goodhart, 74 Yale L.J. 286 (1964); 57 Calif. L. Rev. 281 (1969); 52 Marq. L. Rev. 159 (1968); 53 Minn. L. Rev. (1969); Levitin, 15 Hastings L.J. 436 (1964); Meek, 1964 Wis. L. Rev. 371, 388; Rouse, 23 Ky. L.J. 3 (1934); Note, 36 Iowa L. Rev. 319, 327-28 (1951).

[5]Restatement of Torts 2d 552 (tentative draft No. 10).

be used for investment purposes and that it therefore had a duty to use ordinary care in preparing the report. Whether it was to be used by Hammerly, by Hammerly and someone acting in concert with him or by someone with whom Hammerly had a special relationship does not seem important in light of the fact that Retail Credit was paid for its services and held itself out as a mercantile agency specializing in such a line of endeavor. The Trial Court properly took judicial notice (Tr. 146, 188)[6] that the situation presented in this case is one which commonly occurs in business. It is submitted that even though there was no privity of contract between Pogue and Retail Credit there was a special relationship created by Pogue's relationship with Hammerly and Retail Credit's imputed knowledge that these reports were often used by non-subscribers. See *Davis v. Louisville Trust Co.*, 181 Fed. 10 (6th Cir. 1910) (non-subscriber recovered against person furnishing credit reporting agency incorrect information).

Application of the rule of *Glanzer v. Shephard*, 233 N.Y. 236, 135 N.E. 275 (1922), previously discussed, to the theory of recovery in this case would not only be in accord with the modern trend but would also be consistent with an earlier opinion involving an analogous situation. *United States v. Nuestadt*, 281 F.2d 596 (4th Cir.), *rev'd on other grounds*, 366 U.S. 696 (1961). There an appraiser, negligently investigated the structural soundness of a house. The appraiser was employed by the Federal Housing Administration and reported his findings to it for the purpose of determining how much of a loan guarantee should be fixed by that agency. The buyer was given access to the

[6]Tr. 146, 188. As the Court stated in *Davis v. Louisville Trust Co.*, 181 Fed. 10, 16 (6th Cir. 1910) ". . . courts are accustomed to take judicial notice of the methods of mercantile agencies . . ."

appraisal as a matter of course. The Court held that the buyer's reliance upon the appraisal was actionable under the Federal Tort Claims Act for negligent misrepresentation. The Supreme Court reversed on the grounds that the Tort Claims Act specifically rejected recovery for deceit and negligent misrepresentation. However, the point that, at common law, a cause of action would arise from reliance without privity was not overturned.

It should also be noted that even a strict adherence to the *Ultramares* rule would not justify the action by the Trial Court. For *Ultramares* held that the jury was properly instructed upon the possibility of returning a verdict for the plaintiff based upon constructive fraud. Justice Cardozo wrote:

> "Negligence or blindness, even when not equivalent to fraud is nonetheless evidence to sustain an inference of fraud. At least this is so if the negligence is gross." 235 N.Y., 170, 174 N.E. at 449.

Under this approach "scienter" need not be proved and the case may be submitted to the jury for determination of whether the defendant was guilty of "gross negligence". It is submitted that there was sufficient fact for the jury to be permitted to make a determination of Retail Credit's culpability. As the Court stated in *B & W Acceptance Corp. v. Benjamin T. Crump,*[7] *Inc.*, 199 Va. 312, 99 S.E. 2d 606 (1958):

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[7]Accord *Union Trust Co. v. Fugate*, 172 Va. 82, 200 S.E. 624 (1939); *Chandler v. Russell*, 164 Va. 318, 180 S.E. 313 (1935); *Mears v. Accomac Banking Co.*, 160 Va. 311, 168 S.E. 740 (1933); *Trust Co. v. Fletcher*, 152 Va. 868, 148 S.E. 785 (1929); *Moore v. Gregory*, 146 Va. 504, 131 S.E. 692 (1926); *Schmely Bros. v. Quinn*, 134 Va. 78, 113 S.E. 845 (1922); *Lowe v. Trundle*, 78 Va. 65 (1883).

> "It has been held for a long time in Virginia that when one represents as true that which is not true, and another relies thereon to his damage, the latter may recover for false representation whether it was knowingly or innocently made." Id. at 99 S.E. 2d at 609.[8]

Whether or not a verdict should have been rendered in Petitioner's favor is not the question. The question is whether or not she brought forward enough evidence to have a jury determination of her theory of the case. To hold that there was no evidence to show that Retail Credit failed to use ordinary care (under the theory of *Glanzer v. Shephard, supra*) or was guilty of "gross negligence" (under the restrictive view of *Ultramares, supra*) seems to ignore the whole import of the evidence and testimony presented in the Trial Court.[9] namely:

I. The lack of any meaningful review of the Retail Credit report by a supervisor. Although Heins Arens testified that he "supervised" the report he had no recollection of any participation in its preparation or review. (Tr. 179).

II. The financial and character report which Retail Credit Co. prepared, published and released must be evaluated for what it does not state as for what it does assert. Nowhere is there any indication that the report is not a

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[8]The law of Virginia is applicable under the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). See generally C. Wright, Federal Courts 187-215 (1963).

[9]It should be noted that in testing the correctness of a directed verdict the Court may consider the evidence adduced by either party. *Newman v. Brengle*, 250 F.2d 660 (7th Cir. 1957), cert. denied, 356 U.S. 951 (1958).

complete report or that it was not based upon a full investigation of the available data concerning Walker & Townsend. (Ap. Br. A. 16a).

III. The complete absence of any detriment information whatsoever on the Retail Credit report despite the fact that the employees of Walker & Townsend were under indictment on criminal charges at the time the investigation was made. It also should be remembered that in privately held enterprises often times the activities of a firm become a part of the public records when they do *not* discharge their affairs in a businesslike, forthright manner, and do not become a part of the public record when they do.

IV. The Retail Credit report itself dated August 11, 1967, which states:

> "... Upon our inspection Walker & Townsend, 80 Wall Street, New York City, we find this firm *occupies several offices* on the fourth floor of this building. *They have been here for the past six years.*" "... A source contacted at this business address stated in his opinion *this is a multi-million dollar outfit* ..." (Ap. Br. A. 16a).

Petitioner respectfully maintains that the evidence and testimony in the Trial Court below shows that there was not only sufficient evidence, but ample evidence of negligence on the part of Retail Credit and that her case should have been submitted to a jury for determination. In *Brady v. Southern Railroad*, 320 U.S. 476, 479-80 (1943) the Supreme Court held that directed verdicts would be granted *only*:

"When the evidence is such that without weighing the credibility of the witnesses there can be but *one* reasonable conclusion as to the verdict, the court should determine the proceeding by . . . directed verdict . . ." Id. (Emphasis supplied).

II. DID NOT THE COURT OF APPEALS COMMIT A SECOND ERROR, SEPARATE AND INDEPENDENT OF THE FIRST, WHEN THAT COURT IN ITS OPINION CONCEDED THAT THE PLAINTIFF HAD PROBABLY PROVED HER CASE BUT HAD FAILED TO PROVE RELIANCE BECAUSE "DESPITE MISS POGUE'S TESTIMONY, AN OBJECTIVE EVALUATION OF THE REPORTS PUBLISHED BY RETAIL CREDIT INDICATES THAT THEY CONTAIN NO INFORMATION ON WHICH AN EXPERIENCED BUSINESSWOMAN MIGHT REASONABLY RELY"?

Petitioner respectfully submits that the United States Court of Appeals erred in its decision by ruling on a question that should have been submitted to a jury for determination and that the Court in substituting its opinion for that of a jury, denied Petitioner her right to a jury trial. See *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-80. As the court held in *Jacob v. N.Y.*, (1943) 315 U.S. 752, 62 S.Ct. 854:

"The right of jury trial in civil cases at common law, whether guaranteed by Constitution or provided by statute should be jealously guarded by the courts."

What the Appeals Court did, in substance, was state that although the Trial Court might have given the wrong reason for directing a verdict against Petitioner and in favor of the defendant, Retail Credit, it was nonetheless correct in doing so because the Court of Appeals decided on its own that Petitioner was not entitled to rely on the credit report. That Court in its published Opinion stated:

> "Perhaps appellant met this burden on the question of Retail Credit's negligence in preparing the report. But in order to support an action of deceit, she must also prove reliance, and on that issue she did not meet the test. 37 Am. Jur. 2d *Fraud and Deceit* §223 (1968). Petitioner testified that when she sought additional loans she relied on the fact that the report divulged no additional information detrimental to Walker & Townsend. She also testified that she might even have prevented the transfer of her stocks under the initial power of attorney, even though she had committed herself. Nonetheless, we find that the trial court was correct in directing a verdict for Retail Credit. Despite Miss Pogue's testimony, an objective evaluation of the reports published by Retail Credit indicates that they contain no information on which an experienced businesswoman might reasonably rely . . ."

Petitioner respectfully submits that there was no issue raised on this point during the trial. Petitioner's testimony was uncontroverted and rather than have the Appeals Court decide on either the credibility of her testimony or whether or not she was reasonable in relying on the credit reports and advice given her by Mr. Hammerly the matter

should have been submitted to a jury for consideration. By substituting its own judgment for that of a jury both the Appeals Court and the Trial Court below, violated Petitioner's right to a trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States of America. In *Baylis v. Travelers Insurance Co.*, N.Y. (1885), 5 S.Ct. 494, 113 U.S. 320, 28 L.Ed. 989, the court held:

> "Without a waiver of the right of trial by jury, by consent of parties, the court errs if it substitutes itself for the jury, and passing upon the effect of the evidence, finds the facts involved in the issue and renders judgment thereon."

The evidence in the Trial Court conclusively demonstrates that there was sufficient evidence to show that the credit reports prepared, published and released for use by Retail Credit Co. did contain information on which an experienced businesswoman or businessman might reasonably rely, and directs the Court's attention once again to the credit report prepared by Retail Credit dated August 11, 1967, which states:

> "... Upon our inspection Walker & Townsend, 80 Wall Street, New York City, we find this firm occupies several offices on the fourth floor of this building. *They have been here for the past six years...*"

This material fact assures the reader that Walker & Townsend has been in business in one location alone for the past six years and therefore has been in business *at*

least six years when in fact Walker & Townsend was not incorporated until August, 1965. (See Dun and Bradstreet Report dated July 19th, 1972). App. 16).

The same report continues:

". . . A source contacted at this business address stated in his opinion *this is a multi-million dollar outfit* . . ."

This statement tells the reader that some source, other than Walker & Townsend, at the multi-story building located at 80 Wall Street thought Walker & Townsend to be a multi-million dollar outfit.

It is respectfully submitted that the report is to be *relied* on as much for what it does *not* state as for what it does assert. Nowhere is there any indication that the report is not a complete report or that it is not based upon a full investigation of the available data concerning Walker and Townsend and directs the Court's attention to *State Street Trust Co. v. Ernst*, 278 N.Y. 104, 704, 15 N.E. 2d 416, 16 N.E. 2d 851 (1938), a case involving a firm of public accountants in a situation not unlike that of Retail Credit. Here the Court held:

"Public accountants may be held liable for loss on a loan made in reliance on a balance sheet prepared by them without adequate investigation and put into circulation unaccompanied by a statement showing the limited scope of their audit, although in making the loan there was reliance on the business reputation of the borrower."

This Court also held on the subject of reliance on representations:[10]

> "Fraudulent misrepresentations to be actionable, need not be a sole inducing cause of plaintiff's loss, but *it is sufficient if they were an inducing cause.*" [See R.C.L. title "Fraud and Deceit" § 112].

Petitioner testified (Tr. 85-86) that she considered the report to be favorable by virtue of the fact that Walker & Townsend had been in business for at least six years, was considered to be a multi-million dollar outfit *and* that nothing of a detrimental nature whatsoever had been developed on the firm during its six years of operation. She further testified that she relied on this report (Tr. 228) as did her agent George Hammerly.

George Hammerly was an experienced businessman. He brokered airplane money (Tr. 157); invested in second trusts (Tr. 162); and ventured into the stock market from time to time. (Tr. 168). He also had operated a substantial insurance agency for twenty-five years. (Tr. 144). Mr. Hammerly had been a user of Retail Credit Co.'s services for approximately five years. (Ap. Br. A. 31a) and he knew why plaintiff desired information about Walker & Townsend. In a letter to the plaintiff dated August 14, 1967 (Ap. Br. A. 15a) which accompanied the Retail Credit Co. report he transmitted to her George Hammerly stated:

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[10]See also *Ochs v. Woods*, 221 N.Y. 335, 117 N.E. 305; *Laska v. Harris*, 215 N.Y. 554, 109 N.E. 599.

". . . it is the best I know how to do. It does not look like they are fronting for any crooked outfit so it looks like you are in good shape . . ."

Petitioner, however respectfully submits that it was *not necessary* for her to use even reasonable diligence in relying on the information furnished by Retail Credit Co. by virtue of the "confidential relationship" that existed between Retail Credit and her agent, George Hammerly, and that as the undisclosed principal in this transaction she was entitled to enjoy the same degree of reliance on the reports as was her agent. Whether or not Retail Credit knew she was the undisclosed principal is immaterial by virtue of Retail Credit's imputed knowledge that these reports were often ordered by subscribers for the use of non-subscribers. (Tr. 146, 188).

Petitioner directs the Court's attention to the pleadings filed in this case. (App. p. 24).

"COUNT I

(Breach of Contract)

1. On or about July 25, 1967, Plaintiff's agent, George Hammerly, contracted with defendant Retail Credit Co., that he would purchase and they would sell, one character and financial report on Walker and Townsend Co., of 80 Wall St., New York, N.Y., based on a full investigation.

2. Said contract was made by her agent on behalf of Plaintiff, and the consideration there-

fore was furnished by Plaintiff, an undisclosed principal. Plaintiff made monetary compensation to her agent. Agent made monetary compensation to the Defendant.

3. Defendant breached its contract in that it provided a false report and failed to make proper, full investigation."

37 C.J.S. *Fraud and Deceit*, page 282 (1943) §35 says on the subject of confidential relationships:

"A party may rely on another's representations without respect to their nature as expressions of opinion and without investigating their truth when the relation between the parties is confidential, but reliance may be justified even in the absence of such a relation. *A confidential relationship exists wherever trust and confidence are reposed in another under circumstances as to impose on the person trusted the obligation to act in good faith.*"

Restatement, Trusts Section 2 (b), cited in *Popejoy v. Easturn*, 241 Iowa 747, 757, 41 N.W. 2d 764, 769 (1950) says:

"A confidential relationship exists between two persons when one has gained the confidence of the other and purports *to act or advise the others interest in mind.*"

By definition, the relationship which George Hammerly and his undisclosed principal, Miss Pogue enjoyed

with Retail Credit must be described as a confidential one. Retail Credit was a mercantile credit reporting organization in the business of reporting upon the reputation and credit standing of individuals and corporations for which it received a fee. George Hammerly had been a subscriber of Retail Credit Co.'s services for five years and during that time he repeatedly accepted and relied on the reports Retail Credit furnished him, thereby imposing on Retail Credit the obligation to act in good faith in performing the duty entrusted to them.

Petitioner respectfully submits for the Court's consideration, *Butcher v. Newburger*, 179 A. 240, 241, 318 Pa. 547 (1935), a case somewhat similar to the one at hand. In this situation Butcher gave the manager of Newburger, Henderson & Loeb, a stock brokerage firm an order to purchase 100 shares of Utilities Power & Light Corp. "A" stock for which he was given a receipt for $500.00. At the same time defendant's manager handed him 100 shares of Utilities Power & Light common (non-voting) telling the plaintiff that it was "A" stock. When plaintiff discovered the error he brought suit against Newburger. Defendant countered that plaintiff had a duty to examine the stock certificate and the stock certificate quite clearly said "100 shares Utilities Power & Light common." The Court said "No", and held in favor of the plaintiff, saying:

> *"Where parties deal on basis of trust and confidence, party making representation is bound hereby."*

Another case analogous to the one being reviewed is *Smith v. N. Y. Life Ins. Co.* (1962) 208 F.Supp. 240-244. In this situation the plaintiff, Smith purchased an annuity

contract from defendant for $15,000 based on the defendant's agent's representations that in case of an emergency he could have the policy commuted. One year later what Smith considered to be an emergency arose and he demanded by letter to the defendant the commuted value of the contract. Defendant refused, alleging that the terms of the contract did not provide for payment of the commuted value. Smith brought suit. The District Court ruled in behalf of the plaintiff and was sustained on appeal. The Appeals Court held:

> "Superior knowledge of insurance possessed by the insurer's agent, as well as element of confidential relationship between the parties brought such relationship close to a fiduciary relationship, at least close enough that insured, for purposes of determining whether he had established a right to recover for deceit, was reasonable in relying on statements of agent that annuity policy to be issued could be cashed in an emergency."

Petitioner respectfully maintains that Retail Credit Co.'s relationship with her and her agent, George Hammerly parallels the relationship of Smith with N. Y. Life Ins. Co. Retail Credit Co. possessed superior knowledge in the field of credit investigating and reporting and knew what information a properly prepared and completed credit report should contain. This superior knowledge coupled with the element of confidential relationship which existed between Hammerly and Retail Credit Co. entitled him to rely, without question, on the reports which Retail Credit Co. furnished him on Walker & Townsend. Petitioner was aware of the relationship between Retail Credit and George Hammerly when she agreed to accept the reports from Hammerly and by virtue of her agency relationship with

Hammerly, she, as the undisclosed principal, was also entitled to rely on these reports. As set forth in Restatement, Agency (1933) §315:

> "A person who fraudulently obtains a contract through, or enters into a transaction with, an agent acting within the scope of his power to bind the principal, *or* who by fraud causes the agent to do what would be a violation of his duty to the principal if the agent knew the facts, *is subject to liability to the principal* whether the fraud is practiced on the agent or upon the principal." The rule stated in this section was made applicable whether the principal is disclosed, partially disclosed or *undisclosed.*[11]

This fact, coupled with the element of a confidential relationship,[12] *conclusively* proves Petitioner's right, to blindly and without question, rely upon the credit report prepared, published and released for use by Retail Credit Co.

Petitioner, MARTI POGUE, In Proper Person respectfully submits to the Supreme Court of the United States that the U. S. Court of Appeals for the Fourth Circuit has so far departed from the accepted and usual course of judicial proceedings *and* so far has sanctioned such a departure by a lower court, the District Trial Court, as to call for an exercise of this Court's power of supervision. In support of this statement Petitioner offers the following:

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[11]Cited Texas L. Rev., Vol. 17, No. 1 (1938).

[12]"If confidential relations obtain *nothing short of actual knowledge will prevent recovery for misrepresentation.*", *Butcher v. Newburger*, 179 A. 240, 241, 318 Pa. 547 (1935).

1. The Appeals Court failed to answer conclusively the issue raised on appeal; namely, did not Petitioner prove her case against Retail Credit regarding either negligence or "gross negligence" sufficiently to have the question submitted by the Trial Court to a jury for determination?

2. The Appeals Court in ruling that she had failed to prove her case on the question of reliance ruled on a question not on issue and either overlooked or failed to apprehend the fact that Petitioner relied on a *material* misrepresentation of fact; namely, that " . . . They [Walker & Townsend] have been here for the past six years . . . "

3. The Appeals Court failed to appreciate the significance of the "confidential relationship" she entertained with Retail Credit by virtue of her agency relationship with George Hammerly, whereby she was the undisclosed principal in the transaction with Retail Credit.

4. The Appeals Court in determining that the reports " . . . contain no information on which an experienced business-woman might reasonably rely . . .," substituted itself for the jury, thereby violating Petitioner's right to a jury trial as guaranteed by the provisions of the Seventh Amendment to the Constitution of the United States of America.

CONCLUSION

On the basis of the foregoing arguments Petitioner respectfully requests that the United States Supreme Court grant a Writ of Certiorari in favor of Marti Pogue and remand the case to the U. S. District Court with instructions to instruct the jury on the appropriate theories of relief.

Dated this 30th day of October, 1972.

Respectfully submitted,

MARTI POGUE
In Proper Person
1240 N. E. 117th Terrace
Miami, Florida 33161

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari was mailed to the following addressee this 30th day of October, 1972.

Adelard Brault; Brault, Lewis & Geschickter
P.O. Box 248, Fairfax, Virginia 22030

Counsel for Retail Credit Co.

Marti Pogue

MARTI POGUE
1240 N.E. 117th Terrace
Miami, Florida 33161

APPENDIX

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON D. C. 20543

September 30, 1972

Mr. Marti Pogue
1240 N. E. 117th Terrace
Miami, Fla. 33161

Dear Sir:

As you were advised by telephone on September 27, 1972, this office will file your petition for a writ of certiorari although the time for filing may have expired.

I, therefore, return your motion together with the lower court decision received from the office of the Clerk of the United States Court of Appeals for the Fourth Circuit.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By /s/ Edward C. Schade
E. C. SCHADE
Assistant

law
Encl.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CIVIL ACTION
NO. 247-69-A

MARTI POGUE,
Plaintiff,

vs.

RETAIL CREDIT CO.,
Defendant.

CIVIL ACTION
NO. 278-69-A

MARTI POGUE,
Plaintiff,

vs.

GEORGE HAMMERLY,
t/a Garrett Insurance Agency,
a/k/a George P. Hammerly
Associates,
Defendant.

ORDER

The 5th day of November, 1970, came the plaintiff, in person and by counsel, the defendant, George Hammerly, in person and by counsel, and the defendant, Retail Credit Company, by counsel, and this case came on for trial upon the plaintiff's Complaint and the Answers of the defendants. Thereupon came a jury of eighteen veniremen, who

were sworn and examined on their voir dire and found to be competent and qualified jurors, and from the panel of veniremen, twelve persons were duly selected, with counsel for plaintiff and counsel for defendants each having exercised three peremptory strikes. Thereupon, the said jury heard the opening statements of counsel and heard all of the evidence in the case. At the close of the plaintiff's evidence, both defendants, by their counsel, moved for directed verdicts, which said motions were denied by the Court. After the said jury heard all of the evidence in the case, the defendant, Retail Credit Company, by its counsel, renewed his motion for a directed verdict. After hearing argument of counsel, the Court found as a matter of law that the plaintiff had not proved a contract existed between her and the defendant, Retail Credit Company.

IN CONSIDERATION WHEREOF, it is by the Court ORDERED and ADJUDGED that the plaintiff, Marti Pogue, recover nothing from the defendant, Retail Credit Company.

AND THIS ORDER IS FINAL.

Entered this 13th day
of November, 1970.

OREN R. LEWIS

United States District Judge

(Seal)

A True Copy, Teste:

W. FARLEY POWERS, JR., Clerk

By JOHN EDWARD COX
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 71-1270

Marti Pogue,

Appellant,

versus

Retail Credit Company,

Appellee.

No. 71-1271

Marti Pogue,

Appellant,

versus

George Hammerly, t/a Garrett Insurance Agency,
a/k/a George P. Hammerly Associates,

Appellee.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria.
Oren R. Lewis, District Judge.

(Decided January 19, 1972.)

Before Haynsworth, Chief Judge, and Sobeloff and Boreman, Senior Circuit Judges.

(Daniel G. Grove, and Amram, Hahn, Sandlun and Sandground, and Edward Whitaker, on brief) for Appellant in Nos. 71-1270 and 71-1271; and (Adelard L. Brault and Brault, Lewis and Geschickter, on brief) for Appellee Retail Credit Company in No. 71-1270; (E. Waller Dudley and Boothe, Dudley, Koontz, Blankingship and Stump, on brief) for Appellee George Hammerly in No. 71-1271.

Per Curiam:

In 1967 Miss Pogue, of Miami, Florida, read an advertisement placed by the Walker & Townsend Co. of New York. The advertisement stated that Walker & Townsend would make loans, with securities as collateral, up to ninety per cent of the value of the securities. By comparison, bank loans to finance stock purchases were then retricted to twenty per cent of the value of the securities due to margin requirements. Miss Pogue, an experienced businesswoman who had dealt extensively in the stock market, regarded this offer as an opportunity to pyramid her stock holdings. By borrowing against stock she then held, she could buy more stock, which would in turn be used as collateral for another loan to buy still more stock.

After reading the ad, Miss Pogue traveled to New York to meet representatives of Walker & Townsend. At that time she signed two notes for a total of $33,000 and a blank power of attorney so that Walker & Townsend could obtain her securities from her broker, Walston & Co.

After signing and delivering the notes and the power of attorney, Miss Pogue called appellee, George Hammerly, in Leesburg, Virginia. Hammerly, apparently a friend of

Miss Pogue, was in the insurance business. Occasionally, he would rely on Miss Pogue's advice regarding the stock market. Also, Pogue and Hammerly were co-signers of a note. When Miss Pogue telephoned, she told Hammerly of her transaction with Walker & Townsend and asked him to get for her a Dun & Bradstreet report on Walker & Townsend. Instead, Hammerly sent her a report published by Retail Credit, Inc., the other appellee. He sent the Retail Credit report rather than one published by Dun & Bradstreet, as requested, because he was a subscriber to Retail Credit and not to Dun & Bradstreet. When Miss Pogue received the report, she expressed some chagrin. Hammerly reassured her by saying that Retail Credit had a department for commercial credit as well as one for individual credit, and so it was just as good as Dun & Bradstreet.

This initial report contained no information because Retail Credit had never investigated Walker & Townsend. Hammerly offered to get a complete report but explained that it might be expensive. At Miss Pogue's request, he sought the complete report. This second report also contained little information, explaining that the principals of the company refused to divulge their identity and that Retail Credit could confirm no financial information about Walker & Townsend.

Some months later, Miss Pogue became suspicious of Walker & Townsend because they failed to forward her dividend checks. Discovering that she could obtain a Dun & Bradstreet report through her bank, she did so. The Dun & Bradstreet report disclosed the fact that principals of Walker & Townsend were under a federal indictment. Miss Pogue tried to pay off her loan in order to have her

securities returned. But Walker & Townsend had closed their offices and absconded with Miss Pogue's securities.

Miss Pogue related this scenario at the trial. She tried to rely on a breach of contract theory in order to avoid the Virginia statute of limitation. Apparently, that statute requires an action based on deceit where defendant was indirectly responsible for plaintiff's loss to be brought within one year. *Travelers Ins. Co. v. Turner*, 211 Va. 552, 178 S.E.2d 503, *Carva Food Corp v. Dawley*, 202 Va. 543, 118 S.E.2d 664; *Cover v. Critcher*, 143 Va. 357, 130 S.E. 238. The trial judge reserved decision on the statute of limitation and its application to these cases, and we may do so too. Judge Lewis directed a verdict for defendant, Retail Credit, and allowed the case against defendant, Hammerly, to go to the jury. The jury brought in a verdict for the defendant.

Appellant contends that Judge Lewis committed error in directing the verdict for Retail Credit and in failing to instruct the jury in the case against Hammerly on a theory based on deceit as well as on contract.

Appellant contends that the testimony did disclose evidence of negligence against Retail Credit and that the trial court should have allowed the jury to evaluate this evidence. The test on directing a verdict, however, is not whether there is any evidence, but whether "there are no controverted issues of fact upon which reasonable men could differ." 5A Moore's Federal Practice (2d ed. 1971) § 50.02[1]; *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-80; *Pinehurst, Inc. v. Schlamowitz*, 4 Cir., 351 F.2d 509, 513.

Perhaps appellant met this burden on the question of Retail Credit's negligence in preparing the report. But in order to support an action of deceit, she must also prove reliance, and on that issue she did not meet the test. 37 Am.Jur. 2d *Fraud and Deceit*, § 223 (1968). Miss Pogue testified that when she sought additional loans she relied on the fact that the report divulged no additional information detrimental to Walker & Townsend. She also testified that she might even have prevented the transfer of her stocks under the initial power of attorney, even though she had committed herself.

Nonetheless, we find that the trial court was correct in directing a verdict for Retail Credit. Despite Miss Pogue's testimony, an objective evaluation of the reports published by Retail Credit indicates that they contained no information on which an experienced businesswoman might reasonably rely. Moreover, Retail Credit carefully pointed out that Walker & Townsend assiduously avoided divulging information about itself, even the identity of its principals, a fact that would seem to alert any reasonably experienced person in the business world. Officials of a legitimate business might withhold detailed financial information, but hardly their own identity. The report was one of warning, not of assurance.

Similarly, Miss Pogue produced no evidence on which a reasonable jury could base a determination that she relied on Hammerly in this transaction. In addition, under Rule 51 of the Federal Rules of Civil Procedure, a party may not object to instructions given or not given to the jury unless the party objects before the jury retires. Since the appellant failed to object as required and also failed to submit instructions based on deceit, she cannot now

complain. Even if the appellant feared that such instructions would have been barred due to the trial court's evaluation of the statute of limitations these instructions should have been submitted. Our decision that the trial court committed no error here, however, is based more on the lack of evidence of deceit than it is on the failure to request instructions on deceit.

Since a careful evaluation of the record below and of the briefs submitted on appeal raises no substantial legal question, we dispense with oral argument. For the reason stated above, the decision of the district court is summarily affirmed.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 71-1270

Marti Pogue,

Appellant,

versus

Retail Credit Company,

Appellee.

No. 71-1271

Marti Pogue,

Appellant,

versus

George Hammerly, t/a Garrett Insurance Agency, a/k/a George P. Hammerly Associates,

Appellee.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria.
Oren R. Lewis, District Judge.

(Filed March 6, 1972)

ORDER

Upon careful consideration of the petition to rehear, and with the concurrences of Judge Sobeloff and Judge Boreman, the petition is denied.

FOR THE COURT:

Clement F. Haynsworth, Jr.

Chief Judge, Fourth Circuit

App. 12

EXHIBIT 2

C/a 247-248-69-A

GARRETT INSURANCE AGENCY
P.O. BOX 691
LEESBURG, VIRGINIA 22075

SP 7-1333

August 1, 1967

Miss Marti M. Pogue
245 N. E. 47th Street
Miami, Florida

Dear Marti:

I have ordered the other credit reports and I attach a photostat of a letter on Walker and Townsend. I have asked Retail Credit to make a complete report. As soon as I get them, you will hear from me.

With my kindest regards, I am

Very truly yours,

/s/ George P. Hammerly

George P. Hammerly

/rk
Enc.

App. 13

RETAIL CREDIT COMPANY
Insurance, Credit and Personnel Selection Reports
Home Office, Atlanta, Georgia

July 25, 1967

George P. Hammerly Associates
Leesburg, Virginia

RE: Walker and Townsend
80 Wall Street
New York City

Dear Mr. Hammerly:

In response to your telephone request that we supply you with a copy of reports submitted on Walker and Townsend of the above listed address, we have made a thorough search of our past reports and find that we have not reported on this subject in the New York City area. We further checked with our subsidiary company, Retailers' Commercial Agency of Jamaica, New York, and they too, have never had the the occasion to submit any reports on Walker and Townsend.

Should you desire an up-to-date investigation on this firm; we will be more than happy to comply. If we may assist you further concerning this matter, please contact this office.

Yours truly

Assistant Manager

JFM:bh

EXHIBIT 3

C/a 247-248-69-A

GARRETT INSURANCE AGENCY
P.O. BOX 691
LEESBURG, VIRGINIA

August 14, 1967

Miss Marti M. Pogue
245 N. E. 47th Street
Miami, Florida

Dear Marti:

Attached please find a Retail Credit Report on Walker and Townsend. You are not supposed to have this with my account number on it; hence, you will note I have cut it off.

In any event, it is not very informative, but it is the best I know how to do. It does not look like they are fronting for any crooked outfit, so it looks like you are in good shape. In any event, I hope so.

With kindest regards, I am

Very truly yours,

/s/ George P. Hammerly

George P. Hammerly

/rk
Enc.

RETAIL CREDIT COMPANY
REPORT

Due to the nature of our findings, we are submitting this report in memorandum form.

Upon our inspection Walker & Townsend, 80 Wall Street, New York City, we find this firm occupies several offices on the fourth floor of this building. They have been here for the past six years. This firm is a European finance company specializing in colatoral loans. They are not a fund for any union. Principles of this firm can not be identifies as the firm does not reveal this information. The principles have their identity hidden. Two people will run the firm as representatives in New York City, a Mr. Harrison and a Mr. Lundy. These people, we were told are constantly on the road traveling and very rarely in their office. This firm also has a bookkeeping department located somewhere in Philidelphia. We noted the door to the office had a cable address written Bienvenido, New York.

A source contacted at this business address stated in his opinion this is a multi-million dollar outfit. Please note that this could not be confirmed.

JS 044/sn

EXHIBIT 7

C/a 247-248-69-B

WALKER & TOWNSEND
70 PINE ST (RM 4710)
FMLY: 80 WALL ST.
NEW YORK N. Y. 10005
TEL. 212 422-4940

R. HARRISON, PRES.
HUBERT A. LOPEZ, SEC. & TREAS.
ELSIE CAVICCHIA, AUTHORIZED SIGNER
DIRECTORS: The Officers

PAYMENTS

Nature of business would appear to be of a service type. However, the company is known to have placed advertisements in out-of-town newspapers and, at least in three instances the newspapers have not received payment. One creditor has a bill of $325 long past due. Two others have invoices of over $100 and $266 respectively, that have been placed for collection.

FINANCE

On June 23 1967, at 70 Pine Street, a man who declined to give his identity, was interviewed and detailed financial information declined. Outside sources had no additional information as to subject's financial responsibility. It should be noted that there are slow and past due amounts owing by the company.

BANKING

An out-of-town bank, has an account since May 1967. Balances average from moderate to medium four figures. No requests for loans.

HISTORY

Incorporated New York Aug. 12 1965. The authorization is 200,000 shares of common stock, no par value.

Investigation in outside quarters developed the names of the officers.

R. HARRISON, antecedents not developed.

H. A. LOPEZ, antecedents not developed, but is located at 70 Pine Street and is known to have acted on behalf of the corporation.

ELSIE CAVICCHIA has authorization to sign on behalf of the company. Is reportedly a resident of Newark, N.J. At least in one instance, Elsie Cavicchia acted in behalf of the company by making part payment of a loan, to a client of subject, by means of a personal check. Antecedents currently being investigated.

Subject was previously located at 80 Wall Street which was the business address of Columbia Resources Ltd., in which business, John De Lyra, was associated and had authorization to sign in behalf of the corporation. Present business address is the same location as was used by Christopher Campbell Inc., in which John De Lyra was associated.

In outside quarters consulted it was learned that John De Lyra has acted on behalf of the subject corporation. He has also been seen on the premises.

DE LYRA, marital status not known, born 1920. He is reported to have been active in the real estate management field his entire career. De Lyra is reported to have been an officer, stockholder or active manager in the following corporations, all of which functioned in the real estate management line and all of which maintained their headquarters at 80 Wall Street Franklin Atlas Corp., chartered New York laws Dec. 30 1954; Allstate Securities Inc., chartered New York laws July 11 1957; International Building Management Corp., chartered New York laws Sept. 17 1957; Wall St. Commercial Corp., chartered New York laws June 30 1960. De Lyra is currently Vice President and Treasurer of Water Street Management Corp., formed New York laws Nov. 6 1961. Corporation functions as a real estate management company.

Records of the Southern District of New York (63 CR 843) show that John L. De Lyra was indicted on Oct. 10 1963 on three counts charged with unlawfully making false and fraudulent statements and representations to the Securities & Exchange Commission (Counts 1 & 2), and conspiracy so to do (Count 3). Defendent pleaded "Not Guilty". Bail was set at $5,000. On Mar. 23, 1966, a motion was made to have bail extended (see below) to cover 64 CR 1012. Motion was granted on Apr. 4 1966. Case pending as of July 18 1967.

Records of the Southern District of New York (64 CR 1012) show that on Nov. 23 1964 John L. De Lyra

and another and Allstate Securities Inc.' were indicted for causing shares of stock not registered with the Securities & Exchange Commission to be carried through the mails and Interstate Commerce (Counts 2 & 3) employing schemes to defraud in the offer and sale of stock by use of transportation and communication so to do (Count 1). A plea of "Not Guilty" was entered for Allstate Securities Inc., on Dec. 31 1964. On Dec. 23 1964, the court directed a plea of "Not Guilty" entered on behalf of John De Lyra. Dec. 30 1964 De Lyra filed notice of appearance. July 28 1965 filed $5,000 bail bond. As of July 18 1967 case still pending.

John De Lyra and five others were named in a 30 count indictment handed down by a Federal Grand Jury on Jan. 23, 1967, charging them with collecting more than $250,000 in advance payments from mortgage applicants through wire and mail fraud. Docket # 67 CR 56. John De Lyra pleaded "Not Guilty". Bail set at $5,000; raised to $25,000. Cast still pending as of July 17 1967. This was in connection with the charge that the defendants unlawfully, wilfully and knowingly did devise and intend to devise a scheme and artifice to defraud, and obtain money and property by means of false and fraudulent pretenses, representations and promises.

Columbia Resources Ltd., chartered New York laws Nov. 4, 1964, authorized capital 200 shares no par value common stock, was formerly located at 80 Wall Street, New York, N.Y. Engaged in finance. The latter indictment relates to activities of that corporation.

Christopher Campbell Corp., chartered New York laws June 24, 1964, authorized capital 30,000,000 shares com-

mon stock $.01 par value, also engaged in finance. Present activities, if any, not learned.

OPERATION

Detailed information as to method of operation has not been provided by management. According to newspaper advertisements, company is engaged in finance. Advertise that loans are given to 90% of market value on marketable securities. LOCATION: Rent office in Room 4710 at 70 Pine Street, a modern skyscraper type of structure. 7-19 (486-549 68) T2

App. 21

SN 1 AUG 24 1967 N

FINANCE

1965 NQ

WALKER & TOWNSEND INC.
70 PINE ST
NEW YORK NY 10005
TEL 212 422-9940

Records show that Theodore Kampinski, resident of 301 East 23rd St., N.Y., N.Y. was arrested by the Federal Bureau of Investigation.

He was arraigned in the Southern District Court of N. Y., N.Y. on July 14, 1967. Bail was set at $1,000 on July 17, 1967. A hearing was set for August 17, 1967 and adjourned to September 21, 1967.

It was alleged that from January 1, 1967 to July 14, 1967 he did unlawfully, knowingly and willingly devise a scheme to defraud and obtain money and property by means of false pretenses. Part of the scheme was that Kampinski would hold himself out and represent himself to be Teddy Kayhill, an official of Walker & Townsend Inc. at 80 Wall St.

It was alleged that the defendant would receive from two individuals securities valued at $360,000 and thereafter convert to his own use.

Matter pending as of August 24, 1967.
8-24 (486 16)

SN 1 SEPT 26 1967 N

FINANCE

1965

[Filed Oct. 16, 1967]

WALKER & TOWNSEND INC.
70 PINE ST (RM 4710)
FMLY: 80 WALL ST
NEW YORK N Y 10005
TEL 212 422-4940

PUBLIC RECORD INFORMATION

ITEM: Suit — Goods sold and delivered

AMOUNT: $266

DATE FILED: Sept. 12, 1967

DEFENDANT: (Against) Walker & Townsend Inc.

PLAINTIFF: (Instituted by) Eagle Tribune

FURTHER DETAILS:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(ALEXANDRIA DIVISION)

C.A. 247-69-A

MARTI PAGUE
245 N.E. 47th Street
Miami, Florida

Plaintiff,

vs.

RETAIL CREDIT CO.,
A Georgia Corporation
Serve: C. Thomas Taylor, 700 E. Main Street
Richmond, Va. 23219
Registered Agent

Defendant.

COMPLAINT

COMES NOW, the Plaintiff, by counsel, and asks judgment against the Defendant, Retail Credit Co., in the amount of $125,000 compensatory damages. In addition, Plaintiff demands $125,000 punitive damages, and states the following:

I

The jurisdiction of this court over this cause is founded upon the diversity of citizenship between Plaintiff and Defendant and the amount sued for exceeds $10,000 exclusive of interest, court costs or attorney's fees. The Plaintiff is a resident of the State of Florida. The Defendant is a Georgia Corporation doing business in Virginia.

Count One

(Breach of Contract)

1. On, or about July 25, 1967, Plaintiff's agent, George Hammerly, contracted with defendant Retail Credit Co., that he would purchase and they would sell, one character and financial report on the Walker and Townsend Co., of 80 Wall St., New York, N.Y., based on a full investigation.

2. Said contract was made by her agent on behalf of Plaintiff, and the consideration therefore was furnished by Plaintiff, an undisclosed principal. Plaintiff made monetary compensation to her agent. Agent made monetary compensation to the Defendant.

3. Defendant breached its contract in that it provided a false report and failed to make proper, full investigation.

By reason of the breach of contract, Plaintiff was damaged in the amount of $125,000.

Count II

(Constructive Fraud)

1. Plaintiff adopts Paragraphs 1 and 2 of Count 1.

2. Defendant is a mercantile agency in the regular business of furnishing financial reports upon the request of their subscribers. As such, it has a duty to exercise care and diligence in their preparation.

3. Notwithstanding said duty, defendant failed to exercise care and diligence, and furnished a report prepared with such gross negligence and with such bad faith as to amount to constructive fraud.

By reason of such gross negligence and constructive fraud, Plaintiff was damaged in the amount of $125,000 and $125,000 punitive damages.

/s/ Marti Pogue

Marti Pogue
by counsel

s/

Lucy Logan
Counsel for Plaintiff

/s/ Edward S. Whitaker

Edward S. Whitaker
Counsel for Plaintiff
1400 N. Uhle Street
Arlington, Virginia

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IN THE

Supreme Court of the United States

No. 72-672

OCTOBER TERM, 1972

MARTI POGUE,

Petitioner,

vs.

RETAIL CREDIT COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is not reported, but it is found at Pages 2 and 3 of the Appendix to the Petition for a Writ of Certiorari. The opinion of the Court of Ap-

peals for the Fourth Circuit (Appendix 4-9 of Appendix to Petition for a Writ of Certiorari) is reported at 453 F.2d 336 (1972).

JURISDICTION

No jurisdictional requisites are stated in the Petition. However, it is conceded by Respondent that the basis for jurisdiction is 28 U.S.C. § 1254(1) (1966).

QUESTIONS PRESENTED

1. Whether the one-year Statute of Limitations in Virginia bars an action for constructive fraud.

2. Whether a credit reporting agency is liable to third persons for credit reports negligently or grossly negligently prepared where there is no privity of contract between the agency and the third party.

3. Whether the Court of Appeals erred in holding that there was no evidence on which a jury could find reliance of the Plaintiff on the credit report.

STATUTES INVOLVED

§ 8-24 of the CODE OF VIRGINIA.

STATEMENT

This litigation concerns an action by an individual, Marti Pogue, against a credit reporting agency, Retail Credit Company.

In 1967, Ms. Pogue saw an advertisement placed in a Miami newspaper by Walker & Townsend, Inc., of New

York, a firm which made loans up to 90% of the value of the borrower's stock held by it as collateral (Tr. 58, 59). Wishing to hypothecate or pyramid her stock holdings (Tr. 103), Ms. Pogue travelled to New York City on July 20, 1967, signed authorizations for her stockbroker in Miami to transfer some of her stock to Walker & Townsend, and signed notes in the amount of $33,000.00 (Tr. 29, 60, 65, 66). The next day she requested one George Hammerly of Leesburg, Virginia, to order a Dun & Bradstreet report on Walker & Townsend. Mr. Hammerly did not order the Dun & Bradstreet report, but, instead ordered a Retail Credit report (Tr. 32). According to Ms. Pogue, Hammerly assured her that the Retail Credit Company report would be every bit as good as the one from Dun & Bradstreet (Tr. 34).

Ms. Pogue received the Retail Credit report in August, 1967, and claiming to rely upon that report (See Petitioner's Appendix 15), she did not revoke her previous transaction with Walker & Townsend, but proceeded to make another loan with Walker & Townsend (Tr. 40). Then, becoming suspicious of Walker & Townsend's failure to service her account properly (Tr. 39, 40), she ordered a Dun & Bradstreet report through her Miami bank (Tr. 41). That report (See Petitioner's Appendix 16-20) raised some serious questions as to the integrity of Walker & Townsend, and Ms. Pogue travelled to New York City to visit their offices, only to find them vacant (Tr. 48-51).

On such evidence, the Trial Court found that no cause of action existed on Ms. Pogue's theories of constructive fraud, negligence, or on breach of contract, and directed a verdict in favor of Retail Credit Company.

The jury returned a verdict in favor of the defendant George Hammerly.

The Court of Appeals for the Fourth Circuit summarily affirmed both the directed verdict and the jury verdict. As

to the claim against Retail Credit, the Court of Appeals stated that while Ms. Pogue may have met her burden of proof on showing negligence on the part of Retail Credit Company in preparing its report, she did not meet the burden of proof of showing her reliance on such report. The Court further stated that an objective evaluation of the Retail Credit report indicated that it contained no information on which an experienced business woman such as Ms. Pogue might reasonably rely.

Ms. Pogue has sought a Petition for a Writ of Certiorari to the decision of the Court of Appeals only as to the Retail Credit Company.

ARGUMENT AND AUTHORITIES

I. The One-Year Statute of Limitations in Virginia Bars Pogue's Suit Against Retail Credit.

Retail Credit Company would urge this Court to consider the application of the one-year Statute of Limitations in Virginia. Va. Code Ann. § 8-24 (1957 Repl. Vol.) (See Addendum 1). That statute provides as follows:

> ". . . Every personal action, for which no limitation is otherwise prescribed, shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that in case a party died it can be brought by or against his representatives; *and, if it be for a matter not of such nature, shall be brought within one-year next after the right to bring the same shall have accrued . . .*" Va. Code Ann. § 8-24 1957 Repl. Vol.)

While the Trial Court heard argument on the applicability of the one-year Statute of Limitations, the Court reserved

his decision in the first instance, and rendered the point moot when he directed a verdict for Retail Credit (Tr. 209). The Court of Appeals also reserved decision as to whether or not the one-year statute applied. *Pogue* v. *Retail Credit Company*, 453 F.2d 336, 338 (4th Cir. 1972). Rather than abandon this point, Respondent would like to restate it briefly here.

In *Carva Food Corporation* v. *Dawley*, 202 Va. 543, 118 S.E.2d 664 (1961) the Supreme Court of Virginia applied the one-year Statute of Limitations in a case involving negligence or constructive fraud. There, the defendant was an insurance agent who failed to write an endorsement to the plaintiff's insurance policy. A loss occurred which would have been covered, but for the failure of the endorsement. The suit was based on negligence or constructive fraud, in that the insurance agent allegedly falsely or inadvertently represented that the policy covered the loss in question when in fact it did not. The Supreme Court of Virginia held that the loss was only indirectly a consequence of the representation, and thus the action did not survive, resulting in the application of the one-year Statute of Limitations. The Court stated as follows:

> "Carva's property was not damaged when the insurance policy was issued without full sprinkler leakage coverage. Its property was damaged when water was discharged from the sprinkler system as a result of a windstorm. Dawley was not instrumental in causing the windstorm, nor was he responsible for its results. The damages would not have occurred except for the happening of a severe windstorm, an intervening event which might have never happened. They were the indirect and consequential results of the wrong charged to Dawley. *Carva Food Corp.* v. *Dawley*, 202 Va. 543, 547, 118 S.E.2d 664, 667 (1961).

The circumstances of this case are quite similar to those in *Carva*. Here, the injury suffered by Ms. Pogue resulted from

the absconding by Walker & Townsend of her securities. Her damages were a direct result of their failure to honor their agreement with her and further from their illegal behavior. If it be assumed for the purposes of argument that the Retail Credit report was negligently prepared, it still remains a fact that the loss was occasioned only indirectly by the report. The securities were transferred prior to the request for the report. The direct cause of the loss was the malfeasance of Walker & Townsend. Accordingly, since Ms. Pogue's loss at best would be only an indirect consequence of a negligently prepared credit report, then her suit should have been brought within one year from the time the cause of action arose. As stated in *Richmond Re-Development and Housing Authority* v. *Laburnum Construction Corporation*, 195 Va. 827, 80 S.E.2d 574 (1954):

> "This section has consistently been construed to provide for survival where the damage to property for which recovery is sought is the direct result of the wrong. Where such damage is an indirect result of the wrong, the action does not survive." *Richmond Re-Development and Housing Authority* v. *Laburnum Construction Corporation*, 195 Va. 827, 834, 80 S.E.2d 574, 579 (1954).

Also see *Travelers Insurance Company* v. *Turner*, 211 Va. 552, 178 S.E.2d 503 (1971); *Cover* v. *Critcher*, 143 Va. 357, 130 S.E. 238 (1925).

In Virginia, a cause of action for fraud is deemed to accrue, at the time such fraud is discovered, or by the exercise of due diligence ought to have been discovered. *Stevens* v. *Abbott, Proctor and Paine*, 288 F. Supp. 836 (E.D. Va. 1968). Here, it is clear that the alleged fraud—that the Retail Credit report was not as complete as the Dun & Bradstreet report—was discovered by Appellant in October of 1967, when she received the Dun & Bradstreet report (T. 91). At that time, her cause of action accrued. Thus, any cause of action for negligence or constructive

fraud possessed by the Plaintiff in October of 1967 was barred one year from that date, and most certainly barred on July 16, 1969, the date of the filing of this suit.

II. A Credit Reporting Agency Is Not Liable to Third Persons for Credit Reports Which Are Negligently or Grossly Negligently Prepared Where There Is No Privity of Contract Between the Agency and the Third Party.

Responding to the first point raised in Petitioner's Brief, it is plain that her case rests on two factors:

1. The degree of negligence, if any, which can be attributed to Retail Credit Corporation in the preparation of its report; and

2. Whether or not Ms. Pogue belongs to a class which would foreseeably use that report.

A. Retail Credit was not negligent in the preparation of its report.

The duty of a mercantile agency in regard to investigations and report made by it can be described as follows:

> "All that can be demanded of such a corporation is that it shall make due and diligent inquiries and furnish the results to its customer." *Xiques* v. *Bradstreet Company*, 70 Hun. 334, N.Y.S. 48 (1893) (aff'd without opinion, 141 N.Y. 605, 36 N.E. 740 (1894)).

In addition, when the contract between the mercantile agency and its customer contains a stipulation to the effect that the mercantile agency shall not be held liable for any negligence in the making of the reports, the general rule is that no liability arises as to the customer unless the mer-

cantile agency is guilty of gross negligence, such as would amount to fraud. *Globe Home Improvement Company* v. *Perth Amboy Chamber of Commerce Credit Rating Bureau,* 116 N.J.L. 168, 182 A. 641 (1936). Although contracts against liability are not generally favored, and are invalid when the public interest is involved, they are not contrary to public policy and they are allowed in Virginia. *Lackey* v. *Brooks,* 204 Va. 428, 132 S.E.2d 461 (1963); *J. H. Fralin* v. *American Cyanamid Company,* 239 F. Supp. 178 W.D. Va. 1965; *National Motels, Inc.* v. *Howard Johnson, Inc. of Washington,* 373 F.2d 375 (4th Cir. 1967).

Accordingly, Ms. Pogue could recover against Retail Credit only if she were the customer of Retail Credit, *and* only if Retail Credit were grossly negligent in the investigation and preparation of its report. However, that was not the case here for two reasons. First, there was a stipulation between the person who ordered the report, Mr. Hammerly, and Retal Credit, limiting the liability of Retail Credit. (See Addendum 2.) Secondly, there was a further stipulation that the report would remain confidential and not be disclosed to third parties. Thus both stipulations were to Ms. Pogue's detriment. Not only was Ms. Pogue not a customer of Retail Credit, but she should not have been privy to the report. Additionally, no evidence was produced that Retail Credit was grossly negligent in the preparation of the report. Accordingly, the directed verdict in favor of Retail Credit was quite proper.

One class of cases has placed liability on the part of a furnisher of information to third parties who rely upon such information to their detriment. The leading case in this area is *Ultramares Corporation* v. *Touche,* 255 N.Y. 170, 174 N.E. 441 (1931). There, one Touche, a certified public accountant, had failed to make inquiry into questionable sales records in arriving at a false and inflated net worth figure for Stern and Company, Inc. The plaintiff, Ultramares, re-

lying on the balance sheet prepared for Stern, made several loans to Stern shortly before Stern went bankrupt. Ultramares sued Touche for negligent misrepresentation and fraud. The Court of Appeals, speaking through Chief Justice Cardozo, held that since the service rendered was primarily for the benefit of the Stern Company, and only incidentally or collaterally for the use of those to whom Stern and its associates might exhibit it, foresight of these possibilities could only charge Touche with liability for fraud. However, it certainly would not charge Touche with liability for negligence. *Ultramares Corporation* v. *Touche*, 255 N.Y. 170, 174 N.E. 441, at page 446 (1931). The reason for the distinction is plain. For Touche to have been liable to Ultramares on the grounds of negligence, Ultramares would have to had been in more than a vague class of possible users of the erroneous balance sheet. In other words, Ultramares would have to have been in a foreseeable class of users, and one which was limited in scope. This is the majority position. See *Texas Tunnelling Company* v. *City of Chattanooga*, 329 F.2d 402 (6th Cir. 1964).

In his opinion, Chief Justice Cardozo distinguished *Ultramares* from *Glanzer* v. *Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922). There, the seller of an amount of beans requested a public weigher to weigh the beans and to supply the buyer with a certified copy of the weight. The weigher knew that the amount paid by the buyer depended upon the total weight of the beans. The weight certified was in error and the buyer paid more than he was required. He then sued the weigher for the loss. Judgment was entered for the buyer by the Trial Court, and the Court of Appeals affirmed.

In contrasting the two cases, Chief Justice Cardozo pointed out that "the service rendered in *Glanzer* v. *Shepard* was primarily for the information of a third person [who was] in effect, if not named, a party to the contract, and only incidentally for that of the formal promisee." *Ultra-*

mares Corporation v. *Touche*, 255 N.Y. 170, 174 N.E. 441, at page 446 (1931). However, in *Ultramares*, the service was primarily for the benefit of the Stern Company, and only incidentally for the use of those to whom Stern and his associates might exhibit it. The same situation is present here. Retail Credit's report was primarily for the benefit of George Hammerly. It was at best unintentionally and a worst accidentally for the benefit of Ms. Pogue. Only if Retail Credit were guilty of actual fraud—as opposed to constructive fraud which stems from negligence—would it be potentially liable to Ms. Pogue. Such was not the case.

Moreover, contrary to what Petitioner's brief implies, *Rusch Factors, Inc.* v. *Levin*, 284 F. Supp. 85 (D. Ct. R.I. 1968) does not change the standard set out in *Ultramares*. The defendant accountant in the *Rusch* case knew that his balance sheet was to be used by the plaintiff. Certainly, in that case, since plaintiff was one of a limited class, whom it was foreseen would rely on the information provided, defendant's negligence in giving that information made him liable.

Petitioner quotes the Restatement of Torts for the proposition that a negligent party must know only the existence of a class which will rely upon his information, but not necessarily any of the persons who rely. Certainly, no one would quarrel with that statement. However, the person harmed must still belong to a *class* which can be foreseen to possibly rely on the information provided. The individual harmed cannot be so remote as to make his reliance mere speculation. Here, Retail Credit, particularly in light of its express stipulation, could hardly be expected to know that anyone other than Hammerly would be relying on its report. Thus, that class—people other than the customers of Retail Credit—are unforeseen and too remote so it does become mere speculation that they would rely on the report.

Without question, Retail Credit owed a duty to its customers. George Hammerly was one of its customers. How-

ever, Ms. Pogue was not one of its customers and did not belong to that class to whom the viewing of the credit report would be foreseeable. Accordingly, she was required to show negligence, amounting to fraud, on the part of Retail Credit. This she failed to do and the Court of Appeals was correct in affirming the District Court's direction of a verdict for Retail Credit.

B. Retail Credit was not guilty of gross negligence.

Bearing in mind Retail Credit's stipulation against liability, even if Retail Credit failed to find some information which Dun & Bradstreet found, such failure must have been gross, if it was negligence at all, in order to charge Retail Credit. Certainly, there was no gross negligence here.

In *Bauman* v. *Bradstreet Company*, 238 App. Div. 617, 265 N.Y. Supp. 169 (1933) the question was whether Defendant was grossly negligent for failure to examine a judgment known to have been outstanding against the person being investigated. There, the Court found that there was no duty to investigate the records for judgment and therefore did not even find a case of simple negligence. Even without such a finding, it is probable that there would have been no negligence imputed to the defendant, since the report included information which indicated to the reader upon which factors the rating given was based. Certainly, if there was no gross negligence in that case, Retail Credit could hardly be guilty of any here. Moreover, the indicators upon which the Retail Credit information was based—namely, sources at the business address itself—were shown.

More importantly, a study of the Retail Credit Report itself indicates that there was neither negligent misrepresentation nor any fraud involved in making the report. Even to the uninitiated in business affairs, the report has to be taken as "worthless," which is Ms. Pogue's own characterization of

it (Tr. 85). Even a casual reading of the report shows that there must have been no more information available at the business address of Walker & Townsend than was reported by Retail Credit. Certainly, Retail Credit did not fail to disclose any information which had turned up there. Conversely, the report fails to disclose anything upon which Ms. Pogue or any other reader of the report, could reasonably rely. Certainly, one may rely on information or representation to one's detriment, but it just as certainly must be a reasonable reliance else one is estopped from claiming any damages resulting therefrom. And as the Court of Appeals stated in its opinion:

> "Despite Ms. Pogue's testimony, an objective evaluation of the reports published by Retail Credit indicate that they obtained no information on which an experienced business woman might *reasonably* rely. Moreover, Retail Credit carefully pointed out that Walker & Townsend assiduously avoided divulging information about itself, even the identity of its principals, a fact that would seem to alert any reasonably experienced person in the business world. Officials of a legitimate business might withhold details of financial information, but hardly their own identity. The report was one of warning, not of assurance." *Pogue* v. *Retail Credit Company*, 453 F.2d 336, 338 (1972).

Plainly, not only was Retail Credit non-negligent in the preparation of its report, but it was not the type of report on which anyone could rely.

III. The Court of Appeals Did Not Err in Holding That There Was No Evidence on Which a Jury Could Find Reliance of Pogue on the Credit Report.

Petitioner's second point complains of the fact that the Court of Appeals observed that "an objective evaluation of

the reports published by Retail Credit indicates that they obtained no information on which an experienced business woman might reasonably rely . . ." She argues that what the Court of Appeals did was say that the Trial Court reached the right result, but gave the wrong reason for doing so, and then went on to give the correct reason. While Respondent does not believe that this is what the Court of Appeals did, had it done so, it would have been correct.

It has long been settled that Appellate Courts may sustain judgments which they think are right for reasons other than those which the Trial Courts gave. *Laughlin* v. *Eicher,* 145 F.2d 700 (D. C. App. 1945); *Commissioner of Internal Revenue* v. *Stimson Mill Company,* 137 F.2d 286 (9th Cir. 1943).

> "In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering* v. *Gowran,* 302 U.S. 238, 245 (1937).

Thus, if the Fourth Circuit decided to affirm the decision of the District Court for a reason other than that given by the District Court, then it would be perfectly correct in so doing. However, what appears from the opinion rather is that the Court of Appeals did not substitute its opinion for that of the District Court, but rather added an additional reason for the correctness of that decision.

To further assert, as Petitioner does, that this action by the Court of Appeals amounted to a denial of the right for a trial by jury is ridiculous. The point was not an issue in the Trial Court, the Petitioner did not make it an issue in the Court of Appeals, and the Court of Appeals simply added that it was an *additional* reason for the correctness of the decision below. The cases cited by Petitioner are inapposite as they deal with the situation where the Trial Judge substitutes his opinion for that of the jury, when the

jury should have an opportunity to pass on the issues. Thus, in *Baylis* v. *Travelers Insurance Company,* 113 U. S. 320 (1885) the Trial Court directed a verdict for the defendant without giving the jury, which was not waived by the Plaintiff, the opporunity to pass on a critical issue. *Jacob* v. *New York,* 315 U. S. 752 (1943) was a Jones Act case where the question of the simple tool doctrine was presented and whether or not a jury, as provided by the Jones Act, could determine the factual issue under that doctrine. The Supreme Court of the United States held that it could. *Brady* v. *Southern Railway Company,* 320 U.S. 476 (1943) dealt with a situation where the Supreme Court of the United States held that a jury verdict was improper because there was no evidence of negligence presented. In that situation, a trial by jury had been held and the jury had returned a verdict for the Plaintiff which was set aside by the Supreme Court of North Carolina, whose decision was affirmed by the Supreme Court of the United States. That decision—Where the Appellate Court did substitute its judgment for that of a jury— is hardly an authority supportive of the Petitioner's argument.

In any event, the Court of Appeals was not substituting its judgment for that of a jury, but was rather stating that a review of the evidence indicated quite clearly that the decision of the Trial Court was correct. Again, there can be no doubt but that the Appellate Court can review all of the record, and all of the matters presented in evidence, even though not raised on appeal, in affirming the judgment of a Trial Court. *Kithcart* v. *Metropolitan Life Insurance Company,* 150 F.2d 997 (8th Cir. 1945); *Lum Wan* v. *Esperdy,* 321 F.2d 123 (2d Cir. 1963).

The remainder of Petitioner's argument attempts to show that since she allegedly maintained a confidential relationship with Hammerly, the person who obtained the Retail Credit report, she was entitled to rely blindly on the report

of the credit company. Not surprisingly, no authority is cited for this novel proposition.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied. The Court of Appeals for the Fourth Circuit was plainly correct in affirming summarily the decision of the Trial Court.

Respectfully submitted,
ADELARD L. BRAULT

BRAULT, LEWIS, GESCHICKTER & PALMER
Post Office Box 248
Fairfax, Virginia 22030
Counsel for Retail Credit Company

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief for Respondent in Opposition was mailed, postage prepaid, to Marti Pogue, 1240 Northeast, 117th Terrace, Miami, Florida, 33161, the ..... day of December, 1972.

.....

ADELARD L. BRAULT

ADDENDUM

Section 8-24, Code of Virginia, 1950, as amended.

§ 8-24. Of actions not before specified.—Every action for personal injuries shall be brought within two years next after the right to bring the same shall have accrued. Every personal action, for which no limitation is otherwise prescribed, shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that in case a party die it can be brought by or against his representative; and, if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued. The amendment extending the period within which an action for personal injuries may be brought under this section to two years shall not apply to any cause of action arising prior to July one, nineteen hundred fifty-four. (Code 1919, § 5818; 1954, c. 589.)

1-b

RETAIL CREDIT COMPANY
Atlanta, Georgia

Dear Sirs:

The undersigned desiring to use your reports at the regular prices established by you agrees that all reports will be submitted subject to the following conditions.

All reports will be kept confidential: neither the fact that a report was ordered, nor any information from the report will be revealed to the person reported on or to any other persons except those directly passing on the transaction; no information will be requested for the use of other persons except with your written permission.

We agree to hold Retail Credit Company and all its agents harmless on account of any expense arising from the publishing of information contrary to these conditions.

We agree that the accuracy of any information is not guaranteed by you, and we release Retail Credit Company and its agents from any loss suffered by us from any cause whatever as a result of information reported.

We agree to pay to Retail Credit Company a service charge of $30.00 on this date and on the same date each year thereafter as long as reporting arrangements are in force, provided that the total charges in the preceding twelve-month period do not exceed $200.00. This sum will be considered as a service charge to cover the costs to Retail Credit Company of maintaining service arrangements. It is further agreed, however, that if our total charges in any one year exceed $200.00, this service charge will not be assessed for the following year.

We agree that this letter constitutes all conditions of reporting, present and future, and applies to all reports made by you and by your affiliates. No changes in these conditions may be made except by consent in writing of an officer of your corporation.

Company .....
By GEO. P. HAMMERLY
Title: Owner

Dated 9/27/62 at Leesburg, Va.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-672

MARTI POGUE,

Petitioner,

vs.

RETAIL CREDIT COMPANY,

Respondent.

From the United States Court of Appeals for the Fourth Circuit

---

PETITIONER'S BRIEF IN REPLY

MARTI POGUE, In Proper Person comes before the United States Supreme Court and says that the question of the Statute of Limitations as presented in Respondent's Brief in Opposition is not an issue before this Court because neither the Trial Court nor the Court of Appeals have ruled on this question.

However, as the question has been raised by Respondent, and because Petitioner also desires a ruling on this question, Petitioner, herewith files this her Brief in Reply.

MARTI POGUE, In Proper Person, pursuant to Federal Rule 24 (4) files this Petitioner's reply brief in the United States Supreme Court Case No. 72-672, *Marti Pogue v. Retail Credit Co.* and addresses herself to the question of the Statute of Limitations as was first raised by Respondent in its Brief In Opposition.

Respondent erred in stating that the statute involved in this case is §8-24 of the Code of Virginia and she respectfully maintains that §8-13 of the Code of Virginia is the governing statute in this case and directs the Court's attention to Statute §8-13 which provides:

> "Every action to recover money which is founded upon an award, *or on any contract,** other than a judgment or recognizance, shall be brought within the following number of years next after the right to bring same shall have first accrued, that is to say:
>
> If the case be upon any contract by writing under seal, whether made by a public officer, a fiduciary or private person within ten years;
>
> If it be made upon an award or upon a contract in writing signed by the party to be charged thereby, *or by his agent*, but not under seal, within five years; and

*Italics supplied by author unless otherwise noted.

If it be upon any other contract express or implied within three years unless it be an action by one partner against his co-partner for a settlement of the partnership account, or upon accounts concerning the trade of merchandise between merchant and merchant, their factors, or servants, in either of which cases the action may be brought until the expiration of five years from the cessation of the dealings in which they are interested together, but not after;

Provided that the right of action against the estate of any person hereafter dying, or upon such award of contract which shall have accrued at the time of his death, or the right to prove any such claim against his estate in any suit or proceeding, shall not in any case continue longer than five years from the qualification of his personal representative, or if the right of action shall not have accrued at the time of the decedent's death, it shall not continue longer than five years after the same shall have so accrued; and

Provided further that the limitation to an action or other proceeding for money on deposit with a bank or any person or corporation doing a bank business shall not begin to run until a request in writing be made hereafter, by check, order or otherwise." (Code 1919, §5810.)

That §8-13 is the correct statute is undisputable. As set forth in *Hospelhorn v. Corbin*, 179 Va. 349, 19 S.E.2d 72 (1942):

> "... The language used in the classification of contracts is all inclusive and *no obligation based on a contract*, whether written, verbal or implied is omitted."

Whether the five-year limitation statute applies as opposed to the one-year limitation statute depends on whether or not the action survives the death of the wrongdoes. Only these claims which survive to or against the personal representative if one of the original parties dies is covered by the five-year limitation statute. To clarify for the Court which claims survive, Petitioner quotes from *Winston v. Gordon*, 115 Va. 899, 80 S.E. 756 (1914) Supreme Court of Virginia:

> *"Actions of tort for wrongs to property, real or personal, or which grow out of breach of contract,* but not for wrongs done to the person or reputation or any purely personal wrong, survive."

See also *Westover Court v. Eley*, 185 Va. 718, 40 S.E. 2d 177 (1946); *Watson v. Daniel*, 165 Va. 564, 183 S.E. 183 and *Barnes Coal Corp v. Retail Coal Merchants Association et al;* 4 Cir., 128 F.2d 645 (1942).

This matter of survival was also dealt with in *Lee's Adm'r v. Hill*, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666. Here the court held:

> *"... Where this action is founded on contract, although nominally laid in tort, that action survives."*

> In a note to this case Id. at 672 it is said that 'action founded on contract where there is some wrong to the property rights, or interest, of another, survives the death of the wrongdoer.' "

In 1 Cyc., p. 49, the law upon the subject of survival is well summarized as follows:

> "At common law, as a general rule the qualities of assignability and survival are tests each of the other and are convertible terms. The question when an action survives depends upon the nature of the action and not upon the form of it. It has been held that the line of demarcation at common law, separating those actions which survive from those which do not, is that in the first the wrong complained of affects, primarily and principally, property and property rights, and the injuries to the person are merely incidental, while in the latter the injury complained of is to the person, and the property and rights of property affected are merely incidental . . ."

Petitioner respectfully says to this Court that every case cited in Respondent's Brief In Opposition was an action *ex delicto*, wherein damage was to the person as opposed to property, and with the Court's indulgence she will discuss each of the cases.

Carva Food Corp. v. Dawley, 202 Va. 543, 118 S. E. 2d 664 (1961). In this action the Supreme Court of Virginia applied the one year action limitation in a case involving negligence or constructive fraud. There the defendant was

an insurance agent who failed to write an endorsement to the plaintiff's insurance policy. A loss occurred which would have been covered but for the failure of the endorsement. The suit was based on negligence or constructive fraud, in that the insurance agent allegedly falsely or inadvertently represented that the policy covered the loss in question when in fact it did not. Petitioner maintains that *Carva v. Dawley* is a personal injury action, not a property action and therefore under the law of the State of Virginia would not survive the death of Dawley and quotes as follows:

> "... When Carva found itself unable to collect damages from Equitable, it sought to recover the same damages from Dawley.
>
> This is *not* an action to enforce the collection of damages to property under an insurance policy; but it is an action seeking to hold Dawley personally responsible for his failure to procure for Carva the policy requested by Carva. It was not instituted until four years and eleven months after the last insurance was issued ... 'A claim for indirect and accidental damage to plaintiff's estate arising from an injury, *merely personal* in its nature does not survive.'" See *Mumpower v. City of Bristol*, 94 Va. 737, 27 S. E. 581; *Winston v. Gordon*, 115 Va. 899. 80 S. E. 756; *Cover v. Critcher*, 143 Va. 357, 130 S. E. 238; *Vamce v. Maytag Sales Corp.*, 159 Va. 373, 165 S. E. 393; *Westover Court Corp. v. Eley*, 185 Va. 718, 40 S. E. 2d 177; 1 Mich. Jur., Abatement, Survival and Revival, §30, page 29.

Consequently, in that case the Supreme Court of Virginia, quite properly held that the one-year action limitation under §8-24 of the Code of Virginia applied.

Richmond Re-Development and Housing Authority v. Laburnum Construction Corp., 195 Va. 827, 834, 80 S. E. 2d 574, 579 (1954). This was an action by which plaintiff sought to recover damages done to one of its building as a result of a gas explosion alleged to have been caused by defective workmanship and materials furnished by defendant. The complaint in this action was sounded *in tort* and ". . . in deciding the applicable period of limitation the trial court held that the third amended declaration was an action *ex delicto* in three counts, that Count 1 charged breach of express warranties allegedly made after the work was completed, which induced the payment of the contract price claimed to be due; that Count 2 charged breach of an implied warranty of skill and workmanship; and that Count 3 charged fraud and deceit allegedly committed after the work was completed which allegedly induced payment of the contract price."

> ". . . The trial court held the action to be a personal action and that since there was no special statutory limitation covering the case it was controlled by §8-24, Code 1950.
>
> The trial court decided that as the cause of action alleged in Counts 1 and 3 of the final declaration were not such as would survive they were barred by the one-year limitation. *However*, the court held that Count 2 which charged a breach of an implied warranty of skill and workmanship, (i.e., the failure to perform a duty im-

posed by law was *quasi-tortious* [italics included] conduct directed at the property itself resulting in a weakened structure which ultimately caused the explosion), charged a direct injury resulting from this alleged lack of skillful performance, that this action survived, and thus the five-year statutory limitation was applicable."[1]

The court upon reaching its findings in *Richmond Re-Development and Housing Authority v. Laburnum Construction Corp.*, further stated:

"In considering whether the five-year or the one-year period of limitation in §8-24 is to be applied, we have frequently stated the determining principles. See *Mumpower v. City of Bristol*, 94 Va. 737, 27 S. E. 581, *Winston v. Gordon*, 115 Va. 899, 80 S. E. 756; *Cover v. Critcher*, 143 Va. 357, 130 S. E. 238; *Vance v. Maytag Sales Corp.*, 159 Va. 373, 165 S. E. 393; *Watson v. Daniel*, 165 Va. 564, 183 S. E. 183; *Westover Court Corp. v. Eley*, 185 Va. 718, 40 S. E. 2d 177. In treating the question of survival of actions consideration should be given to §64-135, Code 1950, which provides:

> '*For goods carried away, waste, or damage to estate of or by decedent.*—An action of trespass or trespass on the case may be maintained by or against a personal representative for the taking or carrying away any goods or

[1]The court held, however, that this count was barred by a limitation contained in the contract.

> for the waste or destruction of, or damage to, any estate of or by his decendent.' " (Code 1919, §5385.)

Special notice should be taken of the fact that §64-135, as stated above, applies only to §8-24 and *does not apply to §8-13 which governs contracts.*

Travelers Insurance Co. v. Turner, 211 Va. 552, 178 S. E. 2d 503 (1971). This was an action by insurers, as assignees of agent's customer, Harter, against agent for failure to effect automobile coverage as agreed between him and customer. The Supreme Court of Virginia held that customer could not assign his cause of action against agent for failing to effect automobile coverage as agreed to insurers in exchange for release of insurers' subrogation rights against customer arising out of automobile accident, as damage to customer did not occur when policy was not issued effecting coverage on date agreed upon, but rather at subsequent time because of negligence in operation of his automobile. In ruling in favor of Turner the Court said:

> "Assignability of right to recover damage depends upon whether original action is one which survives at common law, and tests of survivability and assignability of causes of action are the same . . . The damage to Harter did not occur when insurance policy was not issued effecting coverage on the date agreed upon. The damage occurred at a subsequent time because of an intervening event, Harter's negligence in the operation of his car, which might never have occurred. In these circumstances we held that the action

was a claim of a *personal* nature for indirect and consequential damages to Harter's estate and was not assignable.'"

Cover et al. v. Critcher, 130 S. E. 238 (1925). Here, at the solicitation of the defendant, plaintiffs and defendant entered into a contract whereby they were to purchase jointly some 3,000 acres of land, known as the Firmstone tract for $16,500. The defendant, under the contract, was entitled to the lumber and minerals on the land and title to the land when he had paid to the plaintiffs one-half the purchase price of the land, the plaintiffs retaining title until this amount was paid in full.

The Firmstone tract did not lie adjacent to the railroad, and plaintiffs contended that defendant represented to them that he owned, or had secured, rights of way across the lands between the Firmstone tract and the railroad. Whether or not this was true it transpired that defendant did not own the rights of way, and failed to secure them. Plaintiffs brought suit against defendant in which they charged Critcher with procuring the contract with the plaintiffs for the purchase of the Firmstone tract by fraudulent representation as to right of way and prayed for a recission of the contract. The suit was dismissed but "without prejudice to the said Cover to institute such other proceedings as he may be advised."

Nearly three years after entry of the decree Cover re-instituted his action wherein he charged that as a result of the alleged misrepresentation as to rights of way by the defendant, plaintiff claimed he was induced to purchase the Firmstone tract; that by reason thereof he lost 3,800 cords of chestnut oak bark, 10,000 cords of chestnut

wood, and was put to the expense of instituting proceedings to rescind the contract and enforce his lien.

A jury returned a verdict for the plaintiffs for $10,000, but the court set it aside and the Plaintiffs appealed.

The Court of Appeals said:

> "Whether the trial court was right in its conclusion, it is not necessary, in our opinion, to decide, and we express no opinion as to its action, because clearly, we think, the one-year statute of limitation applies in a case such as we have under review . . . The alleged misrepresentation as to rights of way did not operate to take away the goods of the plaintiffs, or cause waste or destruction, or inflict any damage upon, the estate of the plaintiffs. The damage is not direct, but if there was any injury, it was the consequential injury or loss to the estate which *flowed from a wrongful act to the person only.* The plaintiffs' use of the property and not the property itself was affected by the act of which he complains. The conduct of Critcher in failing to procure the rights of way, if proven to have been willful, only prevented Cover from using his property and exercising the right which he claimed to have, and *did not directly injure the property itself,* just as in the Mumpower case the alleged malicious conduct of the city of Bristol simply prevented Mumpower from using his property and did not injure the property."

Bank of Grottoes v. Brown, 8 F.2d 321 (1925). Brown, a citizen of New York rented a safe deposit box from the Bank of Grottoes in which he kept several thousand dollars worth of valuables. In June, 1921 burglars blew open the doors of the bank's vault. There were in the vault two sets of safe deposit boxes, differing in the way in which they were secured from unauthorized entry. The boxes themselves were all alike. Those boxes of one set, among which the renter's was included, were not otherwise secured than by a separate lock on each box. The boxes were put upon a shelf within the vault. Anyone who was within the vault could stretch out his hand and remove any one of them he chose. Most of this class of boxes were opened while in the vault or elsewhere and their contents extracted. The other set, as is usual in safe deposit boxes, were put into separate receptacles, each of which was itself secured by a steel door and lock.

Brown filed suit in Federal Court. His claim to recover against the bank was founded upon the allegation that it had failed to exercise ordinary care in guarding his valuables. Some 16 months elapsed after the burgulary before he brought suit and the bank pleaded a one-year period of limitation. The court, however held this a bad plea, treating as immaterial the fact that the declaration was so phrased as to sound in tort. The court held that the suit might as well have been brought in contract and such a right of action would have survived to an executor or administrator.

When a verdict was entered in favor of Brown, the Bank of Grottoes appealed. The Court of Appeals affirmed the decision of the lower court holding:

> "The learned court below correctly held that the suit was virtually *ex contractu* the right of action for which would have survived to an executor or administrator."

Petitioner includes *Bank of Grottoes v. Brown* in her Brief in Reply because as a breach of contract action it is similar to the one under discussion, and as such, serves to illustrate her point—namely, *that contract actions*, as provided for under §8-13 of the Code of Virginia, *survive and are not subject to the one-year limitation statute.*

Arent v. Brey, 371 F.2d 571 (1967). In this action buyer brought suit for damage for negligence or fraudulent inducement to purchase stock. The defendant moved to dismiss on the grounds that the cause of action was personal and abated the death of the plaintiff. The trial court held otherwise, and was sustained on appeal. The Court of Appeals said:

> "We think the District Judge was correct in holding that the cause of action survived since the injury complained of is one to plaintiff's property other than to his person or reputation. Thus under Va. Code §8-24 (1957), the five-year statute of limitation applies.

Petitioner presents *Arent v. Brey* to the court because it is also similar to the one at bar by virtue of the fact that in both instances the plaintiff either did rely or purportedly relied[2] on fraudulent representations of the defendant and as a result of that reliance suffered injury to *property.*

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[2]Case dismissed for failure to meet the requisite burden of proof.

MARTI POGUE V. RETAIL CREDIT CO,
453, F.2d 336 (1972.)

Petitioner's action against Retail Credit Co. is exactly what the pleadings say it is—a breach of contract on the part of Retail Credit Co. and she respectfully directs the court's attention to the pleadings filed in this case:

Count I

(Breach of Contract)

1. On or about July 25, 1967, Plaintiff's agent, George Hammerly contracted with defendant Retail Credit Co. that he would purchase and they would sell, one character and financial report on the Walker and Townsend Co., of 80 Wall St., New York, N.Y. based on a full investigation.

2. Said contract was made by her agent on behalf of Plaintiff, and consideration therefore was furnished by Plaintiff, an undisclosed principal. Plaintiff made monetary compensation to her agent. Agent made monetary compensation to the Defendant.

3. Defendant breached its contract in that it provided a false report and failed to make proper, full investigation.

By reason of the breach of contract, Plaintiff was damaged in the amount of $125,000.

That Count One is a breach of contract, *ex contractu* proceeding, is undisputable as evidenced by both the pleadings and the facts in the case, and therefore is provided for under §8-13 of the Code of Virginia.

Count II

(Constructive Fraud)

1. Plaintiff adopts Paragraph 1 and 2 of Count 1.
2. Defendant is a mercantile agency in the regular business of furnishing financial reports upon the request of their subscribers. As such, it has a duty to excercise care and diligence in their preparation.
3. Nothwithstanding said duty, defendant failed to exercise care and diligence, and furnished a report prepared with such gross negligence and with such bad faith as to amount to constructive fraud.

By reason of such gross negligence and constructive fraud, Plaintiff was damaged in the amount of $125,000 and $125,000 punitive damages.

Whether Count II herein stated be considered an act *ex contractu* or an action based on tort[3] is immaterial by virtue of the fact as set forth in *Winston v. Gordon*, 115 Va. 899, 80 S. E. 763 (1914):

> "*Actions* of tort for wrong to property, real or personal, or *which grow out of breach of contract . . . survive.*"

---

[3]"Whether the action in such a case (failure to exercise skill and care) is for breach of contract or is based on tort has been a matter of discussion . . ." See. Ann. 120 A.L.R. 1262 (Liability of public accountant).

CONCLUSION

On the basis of the arguments presented in her Petition for Certiorari, together with arguments herein presented, Petitioner respectfully requests that the United States Supreme Court grant a Writ of Certiorari in favor of Marti Pogue and remand the case to the U.S. District Court with instructions to instruct the jury on the appropriate theories of relief.

Dated this 2nd day of January, 1973.

Respectfully submitted,

MARTI POGUE
In Proper Person
1240 N. E. 117th Terrace
Miami, Florida 33161

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief in Reply was mailed to the following addressee this 2nd day of January, 1973.

Adelard Brault, Brault, Lewis Geschickter & Palmer
P. O. Box 248, Fairfax, Virginia 22030
Counsel for Retail Credit Co.

MARTI POGUE
1240 N. E. 117th Terrace
Miami, Florida 33161

ADDENDUM

Section 8-13, Code of Virginia, 1950, as amended.

§8-13. Limitation of personal actions generally. — Every action to recover money which is founded upon an award, or on any contract, other than a judgment or recognizance, shall be brought within the following number of years next after the right to bring the same shall have first accrued, that is to say:

If the case be upon any contract by writing under seal, whether made by a public officer, a fiduciary or private person within ten years;

If it be upon an award or upon a contract in writing signed by the party to be charged thereby, or by his agent, but not under seal, within five years; and

If it be upon any other contract express or implied within three years, unless it be an action by one partner against his co-partner for a settlement of the partnership account, or upon accounts concerning the trade of merchandise between merchant and merchant, their factors, or servants, in either of which cases the action may be brought until the expiration of five years from the cessation of the dealings in which they are interested together, but not after;

Provided that the right of action against the estate of any person hereafter dying, or upon any such award or contract, which shall have accrued at the time of his death, or the right to prove any such claim against his estate in any suit or proceeding, shall not in any case continue longer than five years from the qualification of his personal representative or if the right of action shall not have

accrued at the time of the decedent's death, it shall not continue longer than five years after the same shall have so accrued; and

Provided further that the limitation to an action or other proceeding for money on deposit with a bank or any person or corporation doing a banking business shall not begin to run until a request in writing be made therefor, by check, order, or otherwise. (Code 1919, §5810.)

Section 8-24, Code of Virginia, 1950, as amended.

§8-24. Of actions not before specified. — Every action for personal injuries shall be brought within two years next after the right to bring the same shall have accrued. Every personal action, for which no limitation is otherwise prescribed, shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that in case a party dies it can be brought by or against his representative; and, if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued. The amendment extending the period within which an action for personal injuries may be brought under this section to two years shall not apply to any cause of action arising prior to July one, nineteen hundred fifty-four. (Code 1919, §5818; 1954, c. 589.)

Section 64-135, Code of Virginia 1950.

§64-135. For goods carried away, waste, or damage to estate of or by decedent. — An action of trespass or trespass on the case may be maintained by or against a personal representative for the taking or carrying away any goods or for the waste or destruction of, or damage to, any estate of or by his decedent. (Code, 1919, §5385.)

CERTIFICATE OF GOOD FAITH

Petitioner hereby certifies that Petitioner's Brief For Rehearing is presented in good faith and not for delay. She further certifies that the Petition for Rehearing is restricted to one question; namely, IS A FEDERAL COURT AT THE APPELLATE LEVEL EMPOWERED TO SUBSTITUTE ITSELF FOR A JURY AND RULE UPON FINDINGS OF FACT? and that this question was not presented to the Court in her Petition For Certiorari.

MARTI POGUE

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-672

MARTI POGUE,

Petitioner,

vs.

RETAIL CREDIT COMPANY,

Respondent.

From the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S BRIEF FOR REHEARING

MARTI POGUE, In Proper Person comes before the Supreme Court of the United States and respectfully requests it to reconsider her Petition for Certiorari in the case of *Marti Pogue v. Retail Credit Co.*, Supreme Court Case No. 72-672, and in making this request she asks this

court to address itself to and make a determination on but one question; namely, IS A FEDERAL COURT AT THE APPELLATE LEVEL EMPOWERED TO SUBSTITUTE ITSELF FOR A JURY AND RULE UPON FINDINGS OF FACT?

If the answer to this question is affirmative Petitioner respectfully asks that this Court issue an Opinion to that effect, citing the legal basis for its ruling; if however, the answer to this question is negative it is imperative that Petitioner's request for certiorari be granted as to rule otherwise would be to trespass upon her right to a trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States of America.

Petitioner says that she did not raise this issue in her Petition for Certiorari by virtue of the fact that she considered the answer obvious—that a federal appellate court *cannot** substitute itself for a jury and rule upon findings of fact—and that to argue this question before the learned justices of this Court would have been unworthy and an insult to the intelligence of the Court. Now, however, Petitioner questions the wisdom of her decision, particularly in light of this Court's recent decision in *Davis v. McKeithen*, Supreme Court Case No. 72-660, and by virtue of the fact that by allowing the ruling of the lower court in her case to remain uncorrected, it has in effect ruled that a *federal court* at the appellate level *is* empowered to substitute itself for a jury and *can* rule upon findings of fact, for that is exactly what the United States Court of Appeals for the Fourth Circuit did when it made findings of fact on an issue not on appeal and said in its published Opinion:

*Emphasis supplied by author unless otherwise noted.

> "Perhaps appellant met this burden on the question of Retail Credit's negligence in preparing the report. But in order to support an action of deceit, she must also prove reliance, and on that issue she did not meet the test. 37 Am. Jur. 2d *Fraud and Deceit* §223 (1968). Petitioner testified that when she sought additional loans she relied on the fact that the report divulged no additional information detrimental to Walker & Townsend. She also testified that she might even have prevented the transfer of her stocks under the initial power of attorney, even through she had committed herself. Nonetheless, we find that the trial court was correct in directing a verdict for Retail Credit. Despite Miss Pogue's testimony, an objective evaluation of the reports published by Retail Credit indicates that they contain no information on which an experienced businesswoman might reasonably rely . . ."

It is evident from this statement that Petitioner had met the burden of proof on the question of Retail Credit's negligence in preparing the report and that in ruling to the contrary the trial court, below, erred and properly, the Appeals Court should have remanded the case back to the trial court with instructions to grant a new trial. However, Petitioner respectfully says to this Court that *the Appeals Court did not act properly and did not remand* the case back to the lower court with instructions to grant a new trial; instead, *that court raised an issue not on appeal*, namely, whether or not Petitioner had acted reasonably in relying on the Retail Credit report. Then, that court proceeded, on its own initiative, to make a determination of fact on the issue which it had itself raised and in

so doing, transgressed upon Petitioner's constitutional right to a trial by jury. As set forth by Justice White, in expressing this Court's majority opinion in *Gallick v. Baltimore and Ohio Railroad Co.* (1963), 372 U.S. 108, 9 L.Ed. 2d 618, 83 S.Ct. 659 when it granted certiorari and reversed the decision of the Ohio Supreme Court:

> "It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.[1] *That conclusion whether it relates to negligence, causation or any other factual matter, cannot be ignored.*"

What the Court of Appeals did in Petitioner's case was to rule upon the *reasonableness of her conduct* in relying upon the Retail Credit report and Petitioner directs this Court's attention to 53 Am. Jur. (1945) §198, page 168 on *Reasonableness:*

> "Ordinarily, an issue as to the reasonableness of anything is regarded as a mixed question of law and fact for the determination of the jury, and, is usually, therefore, a question to be determined by the jury. Reasonableness of fright or conduct, of a search or causing an arrest, or punishment inflicted upon a pupil, or opportunity

[1]See also *Washington & Georgetown R. Co. v. McDade*, 135 U.S. 554, 571, 572; *Tiller v. Atlantic Coast Line R. Co.*, supra 68; *Bailey v. Central Vermont Ry*, 319 U.S. 350, 353, 354.

to depart from a station, of rates, or the amount of a levy of the objection of an intoxicated person at a point where there is no available refuge from the cold, ordinarily are questions of fact for the jury."

In *Hanford v. Omaha & C.B. Ry. Co.* (1925), 203 N. W. 643 the court held that the reasonableness of fright caused by a street car collision and the subsequent conduct of plaintiff were questions of fact for determination by a jury. A footnote to 53 Am. Jur. (1945) §156, at page 141, stresses this point emphatically:

> *"In the absence of the jury the judge has no jurisdiction to sit as a substitute for it and perform its function and if he attempts to do so his actions are void."*

The one exception to the right of a jury to make a determination as to the reasonableness of anything is when the jury seeks to rule upon the reasonableness of a law. See *Roberts v. Fuquay-Varina Tobacco Board of Trade, Inc., et al* (1963), 223 F. Supp. 212. In this action the court quite properly held that the "reasonableness of a new regulation [law] adopted by tobacco board of trade and whether regulations constituted an unlawful restraint of trade were not questions of fact but of law for the court." *Sherman Anti-Trust Act*, §1 *et seq.*, 15 *U.S.C.A.* §12 *et seq.*

Obviously, Petitioner's case does not involve the reasonableness of a law; instead, her case involves a finding of the *reasonableness of her conduct and as such is subject to jury determination.* Further, she says to this Court that

under Federal Rules of Civil Procedure 50(a), a rule which Justices Black and Douglas have called, "the process by which the courts have been wrestling from juries the power to render verdicts",[2] the trial court took the case from the jury and rendered a directed verdict in favor of Retail Credit. Therefore, Petitioner did not wave her right to have this matter determined by a jury; furthermore, the question of whether or not she acted in a reasonable manner by relying upon the credit reports prepared by Retail Credit was an issue raised by neither the plaintiff nor the defendant, but was an issue raised by the Appeals Court itself.

Petitioner is cognizant of the fact that during the week of January 9, 1973, in *Davis v. McKeithen*, Supreme Court Case No. 72-660 and 345 F. Supp. 1025 (1972), this Court held that a jury's findings of fact in a civil suit can be overturned by *state* appellate courts and issued a brief order affirming the decision by a special three-judge federal panel upholding the practice under Louisiana law. This ruling not only allows findings of fact by a jury to be set aside, but also, empowers state appellate courts to decide findings of fact. However, Petitioner respectfully reminds this Court that *Davis supra* was a ruling in regard to the actions of a state appellate court while her action deals with a matter tried in federal court and therefore, must be dealt with in the manner outlined in 47 Am. Jur. 2d (1969) §40, page 658, *Actions in Federal Courts:*

> "The Federal Constitution guarantees a trial by jury in civil cases as well as criminal cases in

[2]Statement of Mr. Justice Black and Mr. Justice Douglas on the Rules of Civil Procedure and Proposed Amendments, 374 U.S. 868, 83 S.Ct. 43, 9 L.Ed.2d lxv, lxvi. (1963)

the federal courts and it is provided by statute in all original actions at law in the Supreme Court against citizens of the United States, issues of fact shall be tried by a jury."

While Petitioner does not necessarily agree with the spirit of the decision in *Davis supra*, her personal views being in sympathy with those of the lower court's dissenting opinion expressed by Judge E. Gordon West, she does understand the legal principles on which the majority decision was founded and, in turn, why the Supreme Court upheld that opinion and affirmed the lower court's majority decision. These principles are set forth in 47 Am. Jur. 2d (1969) §9 and §10, pages 632-634:

"The Federal Constitution does not in any place expressly guarantee the right of trial by jury in any state court in any character of case . . . Rights under state law cannot be enforced in federal courts in conflict with the right to jury trial under the Federal Constitution . . . There is authority that the Federal Constitutional provisions guaranteeing that the trial of all crimes except in cases of impeachment, shall be by jury of the state and district wherein the crime shall have been committed, and that suits at common law where the value in controversy exceeds $20.00, the right of trial by jury shall be preserved, *applies only to the Federal Government* and not to state governments, and do not limit the power of the state government to abolish, modify, or alter trial by jury even in a suit in a state court to enforce a right under federal law.

> The public policy of the state with respect to jury trials is determined by its own constitution. The right of trial by jury is a subject of general legislation, and laws affecting it are subject to a constitutional provision that general legislation must operate uniformly throughout the state."

However, Petitioner says that in regard to actions tried in federal court the United States Constitution has sole jurisdiction and that every action must be tried in accordance with its provisions and she quotes from the Seventh Amendment to the Constitution:

> "*Right of Trial by Jury.* In suits at common law, where the value in controversy shall exceed twenty-dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

Rule 38 of the Federal Rules of Civil Procedure amplifies further the Seventh Amendment:

> "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

The importance of the principles contained in the Seventh Amendment was recognized by the United States Supreme Court in *Chicago, B. & O. R. Co. v. City of Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897), when it said:

> "One of the objections made to the acceptance of the constitution as it came from the hands of the convention of 1787 was that it did not, in express words, preserve the right of trial by jury, and that, under it, facts tried by a jury could be re-examined by the courts of the United States otherwise than according to the rules of the common law. The Seventh Amendment was intended to meet those objections and to deprive the courts of the United States of any such authority."

As Judge E. Gordon West held forth in his dissenting opinion in *Davis v. McKeithen:*

> "... Amendment Number Seven, which guarantees the right to jury trial in civil cases ...specifically *precludes appellate courts from examining*, other than according to the rules of common law, *facts found by the jury* ... To conclude, by whatever reasoning adopted, that the right to trial by jury in civil cases, with the findings of fact of the jury being considered final except as otherwise provided by common law concepts, is not and has not always been considered a fundamental right by the American people, is simply to defy history."

If, in accordance with the provisions of the Seventh Amendment, appellate courts are precluded from re-examining facts found by a jury does this same amendment not also *preclude appellate courts from making findings of fact on issues which were not presented to the*

jury for determination? 53 Am. Jur. (1945) §156, page 141 is quite clear on this subject:

> "In cases tried by a jury the court and jury each have, under our system of jurisprudence, separate and distinct functions . . . *It is the province of the court*—the trial judge—*to determine and decide questions or law* presented at the trial, and to state the law to the jury, and *the province of the jury to decide and determine the facts of the case* from the evidence adduced in accordance with the instructions given by the court, and it is the policy of our law to protect the province of the jury from invasion by the courts. To dispense with either court or jury, or to permit one to disregard the province of the other, is to impringe on the right to a jury trial. It is for the court in every case to say what is the law and to determine questions of law arising therein in whatever form presented, and to direct the application of the law to the facts of the case. *It is for the jury to determine or decide disputed claims and questions of fact arising in the case before it . . .*"

Id. §158 and §159 at pages 143 and 144 says on *Questions of fact:*

> "In a case being tried by a jury the court should not undertake to pass on and decide issues of fact. The jury's function has as definite sanction as that of the court. *The controlling functions of a jury are to pronounce on the credibility of*

witnesses; to determine disputed facts; to draw conclusions from doubtful and contradictory premises; and to admeasure damages where the law has afforded no standard. It is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence.

In jury trial cases it is the sole peculiar province and function of the jury to determine and decide disputed claims and questions of fact arising in the case before it, and the law does not countenance any invasion or usurpation by the court of this province and function of the jury to weigh the evidence and find the facts. The jury has the right to draw from the proved circumstances such conclusions as are natural and reasonable."

Once again Petitioner alludes to *Davis v. McKeithen* and the dissenting opinion of Judge E. Gordon West wherein he states:

"The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable or the award of a venire facias de novo by an appellate court for some error of law which intervened in the proceedings. The Judiciary Act of 1789, ch. 20, sec. 17, has given to all the courts of the United States 'power to grant new trials in cases where there has been a trial by jury, for

reasons for which new trials have usually been granted in the courts of the law.' And the appellate jurisdiction has also been amply given by the same act, (sec. 22, 24) to this court to redress errors of law; and for such errors to award a new trial, in suits at law which have been tried by a jury . . . The fact that there are means, at common law, for reviewing finding of fact, in no way diminishes the fundamental nature of the right to trial by jury in civil cases. The fact that there does exist such means of reviewing facts under certain circumstances simply gives meaning to the language of the Seventh Amendment when it says that no fact tried by a jury shall be otherwise re-examined in any court of the United States *than according to the rules of the common law.* (Emphasis included). These 'rules of comon law' *do not include a rule . . . which permits an appellate court to substitute its own finding of fact for those of the jury . . .*"

CONCLUSION

In conclusion, Petitioner respectfully says to this Court that the decision in *Pogue v. Retail Credit Co.*, 453 F.2d 336 (1972), is not correct and it is imperative that certiorari be granted to correct this decision by virtue of the fact that if it is not corrected both the spirit and the intent of the Seventh Amendment to the Constitution of the United States will be violated; in addition, a contradiction in the law will exist as to what is the province of the jury and what is the province of the court, as the lower court's ruling clearly does not conform to the law as set forth in recognized law textbooks and accepted references of authority on jurisprudence. Petitioner further says, that if this ruling is left uncorrected, confusion, error and unnecessary litigation will be created for years to come as it will incorporate into the law a legal prescedent which is clearly unconstitutional.

Dated this ____ day of February, 1973.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief for Rehearing was mailed to the following addressee this _____ day of February, 1973.

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